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joseph f. fletcher

Department of Political Science
University of Toronto

paul howe

Research Director
IRPP

Public Opinion and the Courts

Peter Russell and Paul Howe
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Editors' Note

Decisions rendered by Canada's courts, especially the highest court of the land, have been coming under increasing public scrutiny. Fifteen years ago, debates over Supreme Court rulings rarely extended beyond legal and academic circles. Today many decisions spark impassioned public commentary, much of it critical in tone.

Any number of recent Supreme Court decisions illustrate the point. Public furor erupted in April 1998 after the *Vriend* ruling forced the Alberta government to extend its human rights legislation to protect homosexuals. The Quebec secession reference, though probably less divisive than was anticipated in advance of the decision, also drew its share of criticism. These episodes and others highlight what many take to be a self-evident trend: growing public disenchantment with the power of Canada's courts and the Charter of Rights and Freedoms.

Is this perception accurate? The results of a public opinion survey commissioned by IRPP last spring, and reported in two papers by Joseph Fletcher and Paul Howe in this issue of *Choices*, suggest that reports of plummeting esteem for the judicial branch have been greatly exaggerated. The survey, for example, reveals overwhelming public support for the *Vriend* decision, reflecting a sea change in attitudes toward homosexuals in Canada over the past dozen years. Such findings highlight the importance of seeking the opinions of a random selection of the population in preference to the unrepresentative views of the self-selected minorities who generate the most public commotion.

Other claims advanced in recent times also look dubious. There is ample public support for Canada's courts in general, and even more for the Charter of Rights and Freedoms. Controversial decisions — not just *Vriend*, but the Quebec secession reference too — are more widely endorsed than might be imagined. There are, however, seams of opposition around certain issues. Prime Ministerial prerogative in the appointment of Supreme Court justices is deeply unpopular, as are certain Court decisions involving civil liberties that have led to the exclusion of critical evidence in criminal proceedings.

The IRPP survey fills a gap in public opinion polling in this country. While public sentiment about other components of our political system — parties, governments, Parliament — is regularly gauged using polling data, the courts are often overlooked or given only cursory consideration. But with the growth of judicial power in this country, the need has arisen for more systematic survey research. This area of inquiry is better developed in other countries, and Fletcher and Howe ground their analysis in a comparative context by replicating certain questions and research strategies employed elsewhere. Overall, they find relatively high levels of support for judicial institutions in Canada compared to other countries, while also turning up some nuances and complexities in the comparative data overlooked by other researchers.

Some may question the utility of survey data in relation to complex issues like the role of the courts in the political system, citing a dearth of sophistication and awareness on the part of the general public. It is certainly true that the IRPP survey reveals low levels of public knowledge on certain factual matters relevant to the issues at hand. Yet public attitudes, whether sharply defined or more inchoate, are surely relevant, for there is a populist undertone in much of the current critique which holds that Canada's judges are subverting the will of the people as expressed in democratic chambers. It is hardly irrelevant, then, that public opinion is actually quite supportive of much of the work Canada's courts have been doing.

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Moreover, for all that the judicial branch is meant to be insulated from the pressures of public opinion, it is surely true that institutional arrangements cannot, in the long run, survive unaltered in the face of sustained and widespread public opposition. It is important to have accurate readings of the state of Canadian opinion on the courts and the work they are doing in the Charter era. On current evidence, no significant crisis of legitimacy is on the horizon: support for Canada's judicial institutions is holding up well in most areas of activity.

IRPP Research Staff
Hugh Segal (president)
Sarah Fortin
Paul Howe
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Vice-President, Operations
Suzanne Ostiguy McIntyre

Series Editors
Peter Russell and Paul Howe

Research Assistant
Murray Mincoff

Design
Schumacher Design

Production
Chantal Létourneau

Printing
AGMV-Marquis

IRPP
1470 Peel Street, Suite 200
Montreal, Québec H3A 1T1
Telephone: 514-985-2461
Fax: 514-985-2559
E-mail: irpp@irpp.org
Web site: www.irpp.org

Canadian Attitudes toward the Charter and the Courts in Comparative Perspective

Joseph F. Fletcher

and

Paul Howe

Introduction

Lately, newspaper columnists and editorial writers have been picking up on an issue that has been simmering ever since the Charter of Rights and Freedoms came into effect in 1982: What is the appropriate role for Canada's courts in the Charter era? Some critics of the courts in post-Charter Canada claim that judicial rulings on a variety of contentious matters, from gay rights to police procedures, are effectively making law that would better be left to our democratically elected representatives. Supporters of the post-Charter courts, however, see judicial review of legislative and executive action under the auspices of the Charter of Rights as a safeguard of our democratic rights. While critics of the courts recognize that fundamental individual and minority rights have a place in any democratic society, they typically contend that the pendulum has swung too far and that policies favoured by a majority of Canadians are regularly thwarted by an overzealous judiciary. Supporters, on the other hand, argue that the courts are properly carrying out their assigned role under the Charter of Rights and Freedoms.[1]

There is a question at the heart of this debate that to date has not been adequately addressed: What do Canadians think about the Charter and the new responsibilities of the courts since 1982? Are they satisfied or dissatisfied with the judicial politics of post-Charter Canada? Would they like the courts to show greater deference toward governments and legislatures? Or are Canadians on the whole happy with the Charter and the work of the courts? If citizens are largely satisfied, it would seem difficult to sustain the critics' objections, which are, after all, grounded in the supposition that the views of the majority should be accorded greater weight.

Surprisingly, there has been relatively little investigation of Canadian attitudes toward the courts and the Charter of Rights, particularly in recent years. To help fill this gap, the Institute for Research on Public Policy has commissioned a national survey of 1,005 Canadians on these issues.[2] In several respects, this work draws upon earlier studies using similar questions. Two studies are particularly relevant. The first is the Charter Project based on a series of 1987 surveys.[3] The second is a series of cross-national studies on attitudes toward national high courts.[4] This paper presents findings based on only a portion of our data. Discussion of other questions from the survey will form the basis for subsequent papers.

The focus here is on public attitudes regarding the Charter and Canada's courts. We place our findings in comparative context in two ways. In the first portion of the paper, we offer comparisons across time on questions relating to the Charter. In the second portion, we turn to attitudes regarding the courts in general and Canada's Supreme Court specifically, considering the latter in a cross-national context. Discussion pertaining to the Charter focuses primarily on public awareness and assessments of the Charter. Discussion of the courts looks at public awareness and satisfaction, and examines public reaction to possible reductions in the Court's role and reforms to the current appointment procedure for Supreme Court Justices.

The Charter's Place in the Estimation of Canadians

The Charter of Rights and Freedoms decisively changed the Canadian legal system by extending the power of the Supreme Court to review acts of Parliament and the activities of the executive branch of government. To offset this new power for the Court, the Charter also contained provisions enabling legislatures to override for a time the Court's interpretation of the Charter. Thus a new balance was struck between legislative and judicial power in the Canadian legal regime when the Charter was added to the constitution.

A major impetus for amending the constitution and, more particularly, for promulgating a Canadian Charter of Rights was the nation-building strategy of then Prime Minister Pierre Elliott Trudeau. He sought not simply to rework the balance of powers, but also to promote national unity in a country riven by regional and linguistic cleavages. Trudeau chose the Charter of Rights and Freedoms as the principal instrument to give symbolic and practical expression to his vision of Canadian national identity.

As Trudeau and other proponents envisioned the Charter, it was to be a major socialization device that would instill in Canadians greater support for individual rights and freedoms but also bind them to the nation as a whole. As part of this scheme, Canada's courts would play a more decisive role on questions of basic rights and freedoms. Naturally, not everyone shared Trudeau's enthusiasm for the project. Some were concerned that the Charter would undermine

the power of the provinces to define public policy within their own boundaries and give expression to provincial communities and identities. Others were concerned over the expansion of judicial power at the expense of the legislative and executive branches.

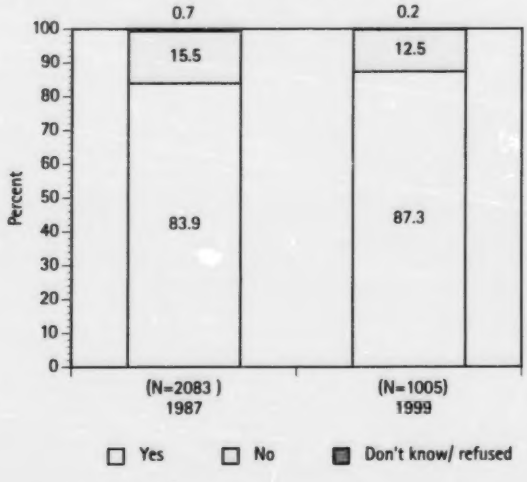
In the following section, we examine what Canadians think about such issues, and how their views have evolved over time.

Awareness and Impressions of the Charter

What do Canadians know about the Charter of Rights and Freedoms? How many have even heard of it? And among those who have heard of the Charter, what are their impressions of it? Do they regard it as a good thing for Canada or a bad thing? Have awareness and attitudes changed appreciably since the Charter's inception? These questions provide a starting point for our inquiry.

To look at awareness, several minutes into nationwide telephone interviews conducted in 1987 and in 1999, a random sample of Canadians were asked, *"Now I would like to ask you whether or not you have heard of the Canadian Charter of Rights?"* The results are reported in Figure 1.

Figure 1
Awareness of the Charter of Rights and Freedoms in 1987 and 1999



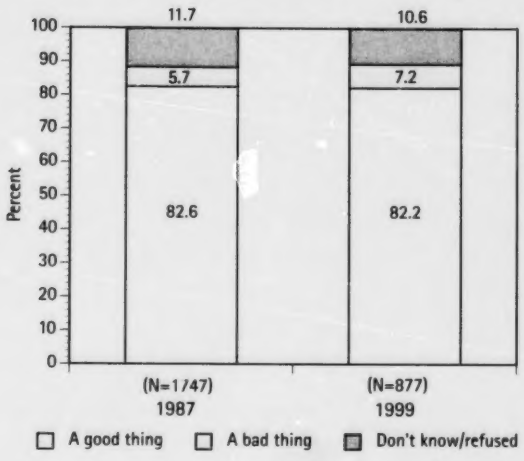
Looking first at the 1987 results, it is clear that the Charter quickly became a familiar feature of the political landscape in Canada. Nearly 84 percent of ordinary Canadians reported having heard of the Charter; only 15 percent had not. A handful of respondents refused to answer the question. There may be, of course, some degree of over-reporting reflected in these positive responses. Still, the figures are impressive. Only a few years after its proclamation a very substantial portion of Canadians recognized that there was something out there known as the Charter of Rights. The results obtained by repeating the question in 1999 are similar. A few more Canadians say they are aware of the Charter; a few less report they have not heard of it. Very few respondents refused to answer. Awareness continues, in short, to be very high.

The next question gauged Canadians' impressions of the Charter. In both 1987 and 1999, everyone who claimed to have heard of the Charter was next asked, *"In general, do you think the Charter is a good thing or a bad thing for Canada?"*

The results, reported in Figure 2, make it clear that the Charter was and remains to most Canadians not only familiar but also much admired. Over 80 percent of those who have heard of the Charter in both 1987 and 1999 say it is a good thing for Canada. Only a small number of Canadians are willing to say the Charter is a bad thing, with no substantial change in views over time. Of course, a portion of citizens are unwilling to commit themselves one way or another, but this too has remained essentially unchanged. Taken together with the questions on awareness of the Charter, these evaluations enable us to succinctly summarize the distribution of opinion on the Charter: Most Canadians know about the Charter and they like what they see.

A question of particular interest to observers of Canadian politics is how the Charter has "played" across the country. Are people in one

Figure 2
Impressions of the Charter of Rights and Freedoms in 1987 and 1999



region more (or less) aware of the Charter than those in other regions? Are those who think poorly of the Charter disproportionately concentrated in one particular region?

The results bearing on regional variation are reported in Figure 3. The figures show the proportion of the population in each region that regards the Charter as a good thing, or a bad thing, as well as those aware of the Charter but without an opinion. The proportion in each region who say they have not heard of the Charter is also included.

The first result of note in looking over Figure 3 is that irrespective of time period, the Charter is regarded as a good thing by strong majorities in every part of the country. The only substantial change comes in the province of Quebec. But that change takes a very particular form. In 1987, more than one in four Quebecers said they had not heard of the Canadian Charter of Rights; now it is one in five. The proportion of Quebecers reporting no awareness of the Charter has clearly declined, in tandem with a small increase in both the percentages viewing the Charter as good and bad. It is important to recognize, however, that the Charter is nevertheless as highly regarded in Quebec as it is elsewhere in Canada.

Regarding the responses in the other regions, the picture remains essentially unchanged between 1987 and 1999. The small fluctuations over time in observed percentages are more apparent than real, for none of them are statistically significant. So the substantive finding remains unchanged: The Charter is well known and well liked all across Canada. There are, of course, those who do not concur. Their numbers do not vary greatly, but the percentage appears to be highest in BC and lowest in the Atlantic region. But nowhere does the percentage of negative impressions break into double digits.

Partisan Differences

Given the clear partisan origins of the Charter, it is also important to note the distribution of opinion by party identification. Of course, the federal party scene is now more complicated in 1999 than it was in 1987, with five rather than three federal parties. Yet even a glance at Figure 4 shows an already familiar story. Among partisans of every stripe in both survey years, we find strong majorities saying the Charter of Rights is a good thing. This is not to say that party affiliations do not have an influence on views of the Charter. In fact, in the 1987 results we note that simply reporting any party affiliation appears to be associated with positive regard for the Charter. The most important contrast within Figure 4 is not between supporters of different parties but rather between partisans and the one-quarter of respondents who do not express a partisan preference. The latter are substantially less likely to report they have heard of the Charter or to have an opinion about the Charter if they have heard of it. Still, most of them see the Charter as a good thing. The differences among those who do identify with the three major political parties are rather small, with Progressive Conservatives only slightly less likely to see the Char-

Figure 3
Attitudes toward the Charter by Region, 1987 and 1999

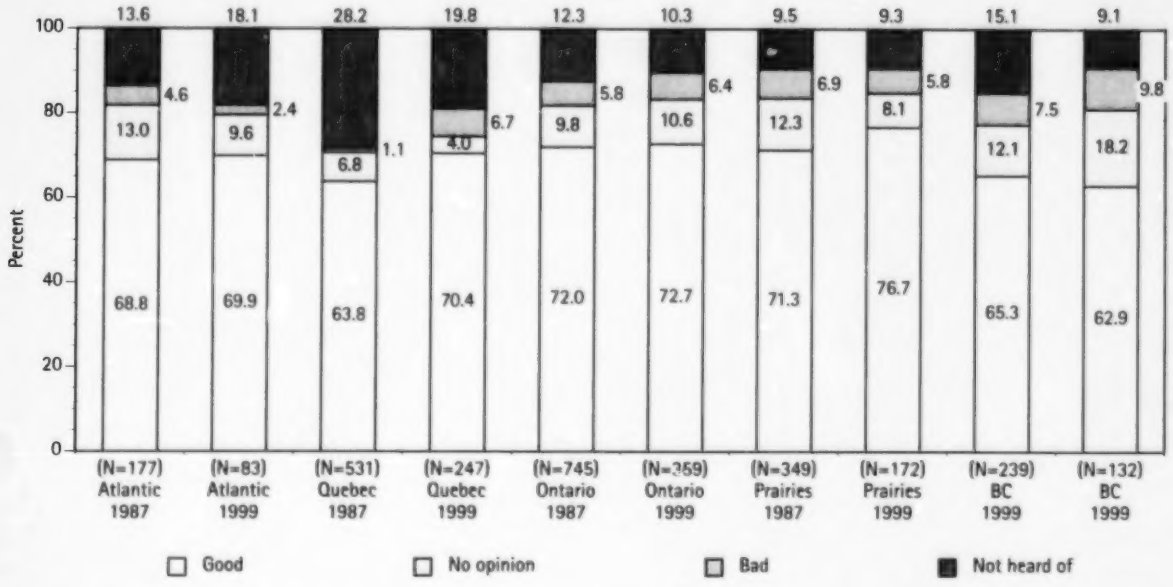
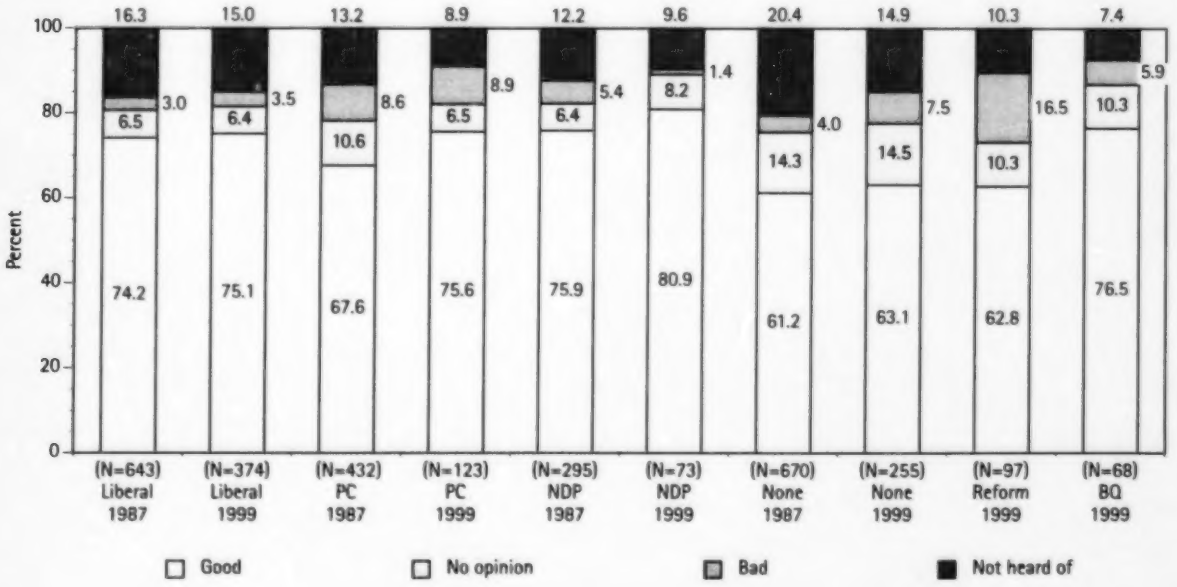


Figure 4
Attitudes toward the Charter by Partisanship, 1987 and 1999



ter as a good thing and just a bit more likely to see the Charter as a bad thing.

In 1999, as Figure 4 shows, those without a party preference remain less aware of the Charter than other groups and, if aware, less likely to have an opinion about it. Yet even most non-partisans still say the Charter is a good thing. Among supporters of the three older parties, there are no substantial changes over time. The percentages may seem to suggest that the PC and NDP supporters are more favourable toward the Charter now than they were in 1987, but the differences are not significant. The real changes over time come with the addition of two new partisan groupings, Reform and Bloc supporters. Although the sample in each case is very small, the general tendency of each newer party is clear. Reform supporters, with just over sixteen percent answering that the Charter is a bad thing, are somewhat less enamoured with the Charter than other partisans. Nevertheless, a very clear majority of Reformers see the Charter as a good thing, though a substantial number either have no opinion or say they have not heard of it. For their part, partisans of the Bloc Québécois view the Charter in much the same way as their counterparts in the three older parties do.

Summing up our findings, it is apparent that the Charter was and remains widely known and highly regarded by Canadians generally. Most say they have heard of the Charter and, moreover, that they think it is a good thing for Canada. These findings hold true right across the country and across all major partisan groupings, including those without a partisan preference. Only a very few Canadians express a negative view regarding the Charter. And even in the regions and parties where they are most numerous, those who say the Charter is a bad thing are clearly in the minority.

Further results, showing breakdowns in Charter support by age, level of education, place of birth (in Canada or elsewhere) and sex, for both the 1987 and 1999 surveys, can be found in the Appendix in Table A-1. There is a greater incidence of "do not know" and "never heard of" responses among certain categories of respondents, such as women and the less educated. For the most part, however, the proportion offering these responses has diminished over time. Aside from this, there are no salient differences across social and demographic categories, thus confirming our basic finding: most Canadians know and like the Charter.

Ideas Underlying Attitudes toward the Charter

When the Charter of Rights and Freedoms was proposed, the ensuing debate over whether to adopt a constitutional bill of rights brought forth three powerful considerations. To some extent, these issues embody fundamentally different views of Canada. Charter proponents often spoke of Canada as a free association of individuals, each possessing certain fundamental rights and freedoms. Arguing from this basic premise, they favoured the Charter because it symbolically expressed the common rights of all Canadians and therefore would have a unifying effect on the country. Whether this would occur was a line of contention between Charter proponents and opponents.

A second consideration concerned provincial powers. Many of the Charter's detractors viewed Canada as an association of provinces, not individual citizens, a view forcefully expressed by Peter Lougheed, then premier of Alberta. Working from this premise, Lougheed and others saw the Charter's focus on individual rights as potentially weakening the power of the provinces.

A third issue dividing Charter proponents from Charter opponents was the matter of who should make the final decision on basic rights questions, Parliament or the Courts. In the debate leading up to the Charter and in the years since its adoption, critics of the Charter have charged that a constitutional bill of rights gives too much power to the

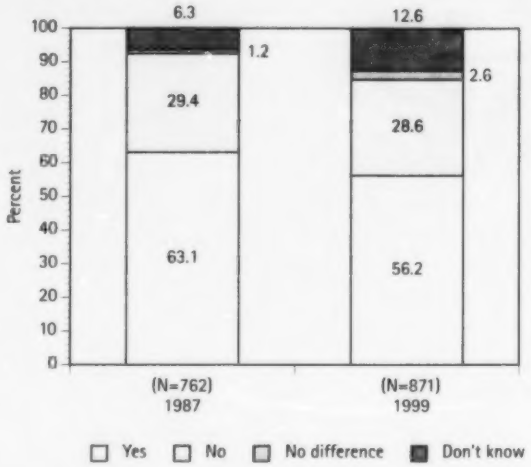
courts in making decisions about the meanings and limits of rights and freedoms. Charter defenders, on the other hand, have tended to favour the Courts. The Charter itself embodies something of a compromise in the form of the section 33 override (the "notwithstanding clause"), but this has been rarely used.

To what extent have these theoretical arguments made inroads into the public consciousness? In order to see whether concerns such as unifying the country or weakening the provinces have conditioned Canadians' evaluations of the Charter, respondents to the 1987 survey who had heard of the Charter were asked, *"Do you think the Charter of Rights will strengthen Canadian national identity?'* and *'Do you think the Charter of Rights will weaken the power of the provinces?"*[5]

In the recent survey, these wordings were modified slightly to reflect the fact that the Charter has been in effect for nearly seventeen years and thus any such effects should have begun to materialize. Accordingly, the wordings in 1999 were *"Do you think the Charter of Rights strengthens Canadian national identity?"* and *"Do you think the Charter of Rights weakens the power of the provinces?"* The cross-year comparisons are presented in Figures 5 and 6.

Looking first to the identity question, this argument had immediate and obvious appeal. Nearly two-thirds of Canadians accepted the proponents' view that the Charter would promote Canadian national identity. About a third of Canadians did not accept this argument. Relatively few (1.2 percent) said it would make no difference, and six percent said they did not know. Posing the question again in 1999 shows that the identity argument has had substantial staying power. Most Canadians continue to think the Charter does promote Canadian national identity. The percentages have declined slightly, but there has been no increase in the "no" percentage. The offsetting increase comes in the percentage of respondents who say they do not

Figure 5
Does Charter Strengthen National Identity, 1987 and 1999



know whether the Charter strengthens national identity. Very few respondents (2.6 percent) said it makes no difference. Overall, Canadians remain largely convinced of the Charter's nation-building impact, though perhaps a few more wish to reserve their judgment about the matter.

What about the argument on the other side of the ledger? Have Canadians been persuaded that the Charter weakens the power of the provinces? This argument, often made by opponents of the Charter, was accepted by only about a quarter of the population in 1987; the 1999 figure is very slightly lower. In 1987, 60 percent of Canadians thought the Charter would not weaken the power of the provinces; today, the percentage is off slightly to 55 percent. Again we see that Canadians in 1999 are just a little less likely to accept either side of the argument and a little more likely to reserve judgment. One in five Canadians say they do not know whether the Charter weakens the power of the provinces. Very few (1.5 percent) said it makes no difference.

A third issue dividing Charter proponents and critics is the question of who should rightfully make the final decisions on rights issues. To find

Figure 6
Does Charter Weaken Power of Provinces, 1987 and 1999

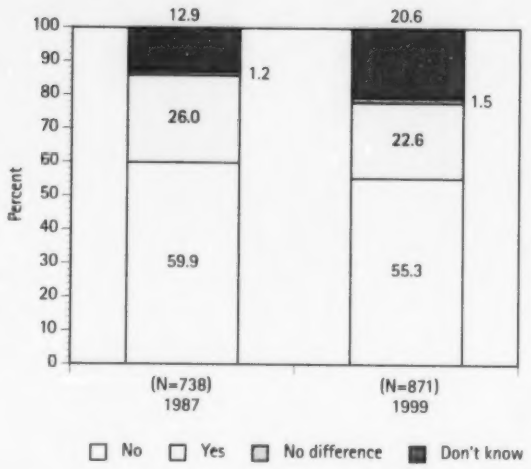
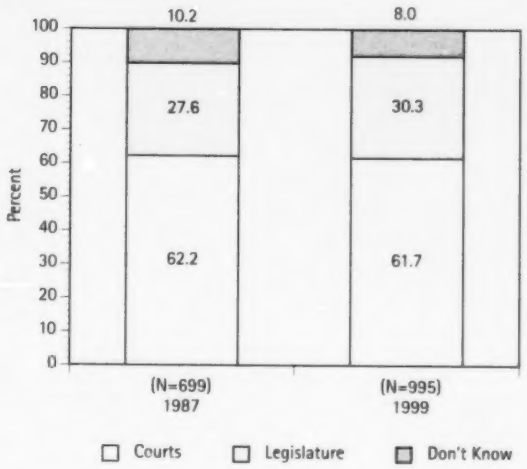


Figure 7
Who Should Have the Final Say, 1987 and 1999



out where Canadians stand on this question, respondents on both surveys were asked: *"When the legislature passes a law but the courts say it is unconstitutional on the grounds that it conflicts with the Charter of Rights, who should have the final say, the legislature or the courts?"* The results appear in Figure 7.

The position advanced by Charter opponents is hardly more popular on the "final say" question than it was on the previous one. In 1987, roughly sixty percent of Canadians preferred that the courts have the final say, whereas just about thirty percent favoured the legislature.[6] The results are virtually the same in 1999 with people continuing to favour the courts over the legislature by a two-to-one margin. The proportion who say they do not know remains essentially constant as well.

On all three issues, then, Canadians are generally more likely to accept the arguments of the Charter's proponents. On each question there is essentially a sixty-thirty split with about 10 percent undecided. This was true in 1987 and remains so today.

Moreover, the positions people adopt on these questions are related to their assessments of the Charter generally. The more likely a respondent is to accept the national identity argument, the more likely he or she is to be favourably disposed toward the Charter. Similarly, the more likely one is to reject the notion of its weakening provincial power, the more one sees the Charter as a good thing. And finally, support for the Charter is related to favouring the courts over the legislature when it comes to which should have the final say. These results can be succinctly summarized using a measure of overall association. The Cramer's V values, presented in Table 1, measure the degree of correspondence between attitudes toward the Charter on the one hand and attitudes on each of the issues on the other. A value of zero indicates no correspondence, with higher values indicating increased correspondence. The values for region and party are included for comparison.

As Table 1 makes clear, there is only a modest degree of association between region or party identification and attitudes toward the Charter. Moreover, this has not changed appreciably over time. This is, of course, what we saw earlier in Figures 3 and 4.

Canadians' views about the Charter's impact on national identity correspond much more

Table 1
Association with Attitudes toward the Charter, 1987 and 1999: Cramer's V scores

	1987	1999
Region	.08	.09
Party Identification	.11	.13
Strengthen Identity	.38	.36
Weaken Provinces	.25	.34
Courts vs. Legislatures	.12	.23

closely to attitudes toward the Charter in both the 1987 and 1999 surveys. The argument that the Charter promotes national identity was relevant from the outset and remains an important factor in the public mind today. Concern over weakening the power of the provinces was only modestly related to views of the Charter in 1987. Since then, the correspondence between views of the Charter and attitudes regarding provincial power has increased considerably, so that now considerations around the Charter's impact on provincial power are more or less as important as those regarding its effects on national identity. There is also a substantial change in the degree of correspondence between the "courts versus the legislature" question and assessments of the Charter. In 1987, preference for the courts or the legislature was only weakly related to evaluations of the Charter. In 1999, the correspondence shoots up considerably. Favouring the courts as the ultimate decision-making body on rights issues now corresponds more closely with assessments of the Charter.

One way of understanding these findings is that the institutional implications of the Charter have begun to penetrate the thinking of the citizenry. While the more symbolic issue of national identity has been related to Canadians' views of the Charter all along, only more recently have the implications of the Charter for the provinces and the "courts versus legislatures" question begun to be linked with attitudes toward the Charter in the public mind. Both issues are now more clearly related to what Canadians think about their Charter.

These links do not mean, of course, that there is a perfect correspondence between these different attitudes and views on the Charter. Nothing could be further from the truth. The coefficients are not only far from the perfect score of 1.00 but also must be seen within the overall context of widespread support for the Charter. Thus even those who prefer the legislatures to the courts are still overwhelmingly (76 percent) of the opinion that the Charter is a good thing. It is just that they are less likely to hold that view than those who favour the courts (88 percent).[7] What this correspondence does indicate though is that opinions about the courts do influence Charter assessments.

Canadian Attitudes toward the Courts

While current debates about judicial politics sometimes revolve around the merits and shortcomings of the Charter, critical assessments often focus on the courts. The problem, it is said, is not the Charter, but the expansive interpretation of that document by an overzealous judiciary. A closer examination of public support for the courts sheds light on how Canadians in general, along with various subgroups of the population, feel about this claim.

It was reported above that when respondents were asked who should have the final say, the courts or the legislatures, they favoured the courts by a 2 to 1 ratio in both 1987 and 1999. Figure 8 shows the regional breakdown in these attitudes. The overall pattern is similar to the regional breakdown in Charter support, described above in Figure 3. In both 1987 and 1999, there is majority support for the courts over the legislature in every region of the country.

Figure 8
Who Should Have the Final Say by Region, 1987 and 1999

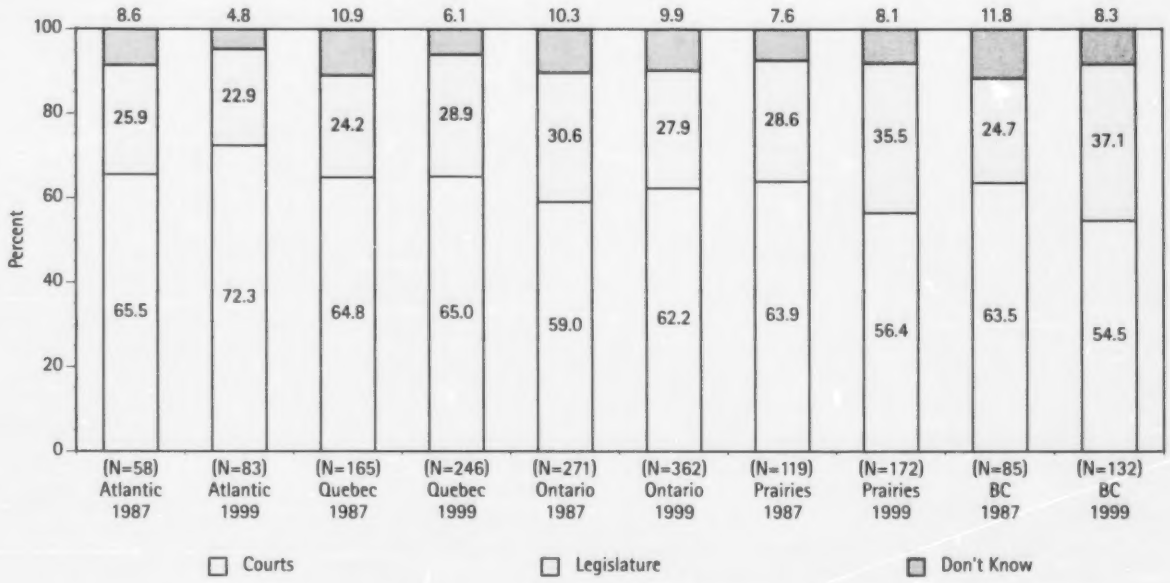
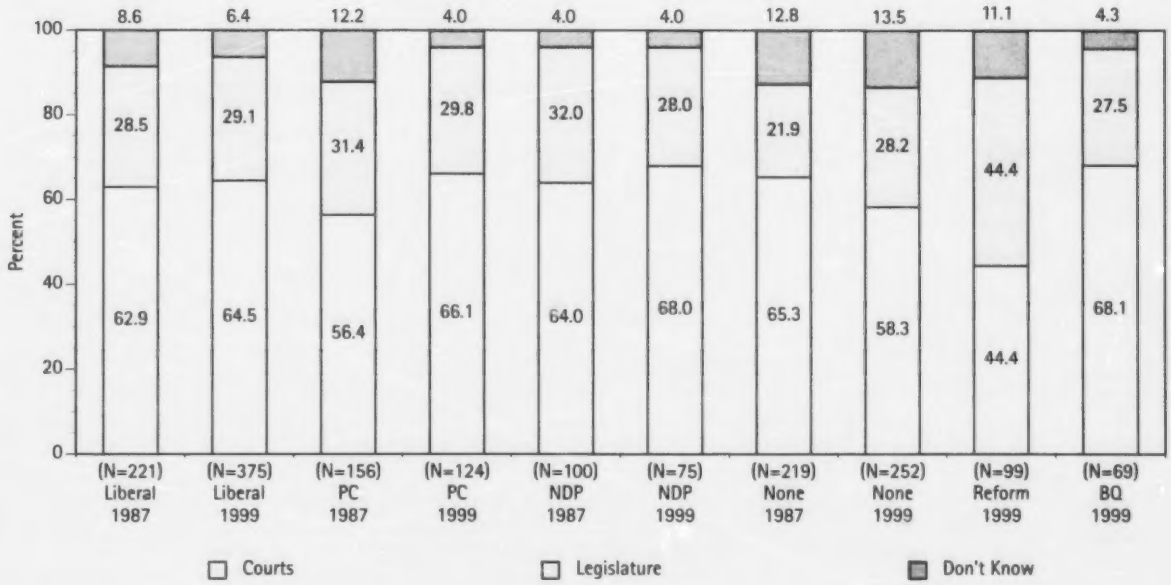


Figure 9
Who Should Have the Final Say by Partisanship, 1987 and 1999



No statistically significant regional difference emerges in either the 1987 or 1999 data, but the percentages appear to move somewhat in certain regions. The majority in favour of the courts may seem bigger in Atlantic Canada, and in the Prairies and BC it may seem smaller; however, these changes are not statistically significant with samples of these numbers. In Quebec and Ontario the percentages remain more or less constant. Overall, the majority in every region favours the Courts.[8]

Turning to partisan breakdowns, Figure 9 reveals that supporters of most federal parties also strongly favour the courts over the legislature. But there has been some change over time: Progressive Conservatives are now less likely to reserve judgment and more likely to support the courts. The views of Liberals, NDPers and non-partisans have not changed significantly.

To no great surprise, the one group that shows marked opposition to judicial authority is Reform supporters, who split down the middle on the courts versus legislatures question in 1999. Others, including potential allies on the right of the political spectrum, do not share this sentiment: 66 percent of Tory supporters favoured the courts in 1999, compared to only 44 percent of Reformers. The sample sizes are small, but this difference is statistically significant. The power of the courts, it would appear, is an important issuing dividing partisans of the two conservative parties.

Further results, showing breakdowns on the courts versus legislature question by age, level of education, place of birth (in Canada or elsewhere) and sex, for both the 1987 and 1999 surveys, can be found in the Appendix in Table A-2. As with Charter support, there are higher levels of "do not know" responses for certain categories of respondents such as women, the less educated and older Canadians. In addition, there seems to be a slightly stronger preference for the courts among younger Canadians and a greater tendency to favour the legislature among Canadians with more formal education. But these differences are small and the results principally confirm that a majority of Canadians across virtually all social and demographic strata, when asked who should have the final say, the courts or the legislature, express their support for judicial authority.

Taking the Measure of the Courts: Comparisons with Other Countries

The analysis to this point has focused on Canadian attitudes over time, the most striking result being the absence of change from 1987 to 1999 in the substantial public support for both the Charter and the courts. Another useful type of comparison is cross-national, for the debates taking place in Canada about the place of the courts are echoed in other countries where the judiciary wields a certain influence. Canadians are probably most familiar with the stir this issue has caused in the United States, where the practice of judicial review originated and where the Supreme Court has, to mixed reviews, played a pivotal role in shaping public policy on a variety of contentious issues over the years. But the practice of judicial review, along with debates about its merits, are nowadays widespread, and there is insight to be gained from comparing the Canadian experience to developments in a variety of different countries.[9]

It is only in the past few years that researchers have started to undertake systematic comparisons of public opinion toward the courts in different countries.[10] For the present survey, a series of questions identical to those used on surveys conducted elsewhere was included in order to see how Canadian opinion ranks cross-nationally. These questions focus on the highest court in each place — the Supreme Court in the Canadian case — rather than the courts more generally.

The first comparison concerns levels of awareness. Respondents were asked, *"Would you say that*

you are very aware, somewhat aware, not very aware, or have you never heard of the Supreme Court of Canada?" The results, shown in Figure 10, indicate that comparatively speaking Canadians are quite aware of their highest court. Fully three-quarters indicate that they are somewhat or very aware.[11] Awareness levels are slightly lower than in the United States, Germany and Britain, but considerably higher than in many other countries.

Levels of awareness are not, however, consistent across the country. Of the questions on the 1999 survey, this one offers up one of the more striking differences between Quebec and the rest of Canada (ROC): only 42 percent in Quebec count themselves among the somewhat or very aware compared to 87 percent in the rest of Canada. While the sample size for Quebec is small, and it would be wrong to put too fine a point on the matter, it is clear that levels of awareness in that province fall well below those in other parts of the country.[12, 13] It is also apparent that awareness levels in the rest of Canada are as high as anywhere else in the world.

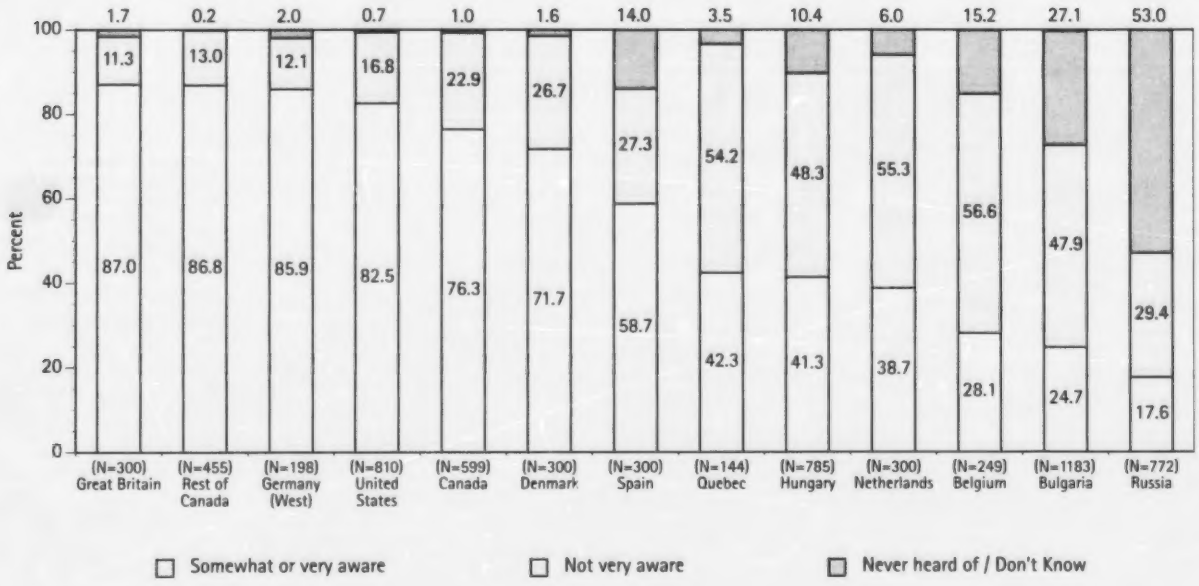
The lower level of awareness in Quebec is not entirely surprising. Studies of Court rulings have found that Quebec generates a relatively small proportion of Charter appeals to the Supreme Court.[14] At the same time, Charter cases may be less salient in Quebec, given the particular concerns that drive political debate in that province. The division of powers between the provinces and the federal government is a more pressing concern in Quebec than the balance of power between the judicial, legislative and executive branches of government. While the Supreme Court continues to rule on a variety of different issues, its public prominence nowadays is largely a reflection of its role in shaping public policy through its interpretation of the Charter of Rights. It is perhaps not surprising, then, to find that levels of Supreme Court awareness are lower in Quebec — though the magnitude of the difference is quite striking.

Survey respondents were next asked to indicate how satisfied they were with the way the Supreme Court has been working: very satisfied, somewhat satisfied, not very satisfied or not satisfied at all. As Figure 11 indicates, Canada again fares well, sitting third from the top among a cluster of established democracies where satisfaction with the operation of each country's highest court is very high. Satisfaction is lower in Quebec than in other parts of Canada, though not markedly so. As with the earlier question about who should have the final say in cases of conflict, the courts or the legislatures, we find no evidence in Canada of widespread dissatisfaction with the courts.

Another interesting finding apparent in Figure 11 is the low level of undecided respondents in Canada compared to other places. Only seven percent of Canadians indicated they did not know what they thought of the way the Supreme Court has been working, a lower figure than in all other countries but the United States. This, of course, is in keeping with the awareness levels reported above: in places such as Russia and Bulgaria, where awareness levels are low, the incidence of non-opinion is higher than in established democracies such as Canada.

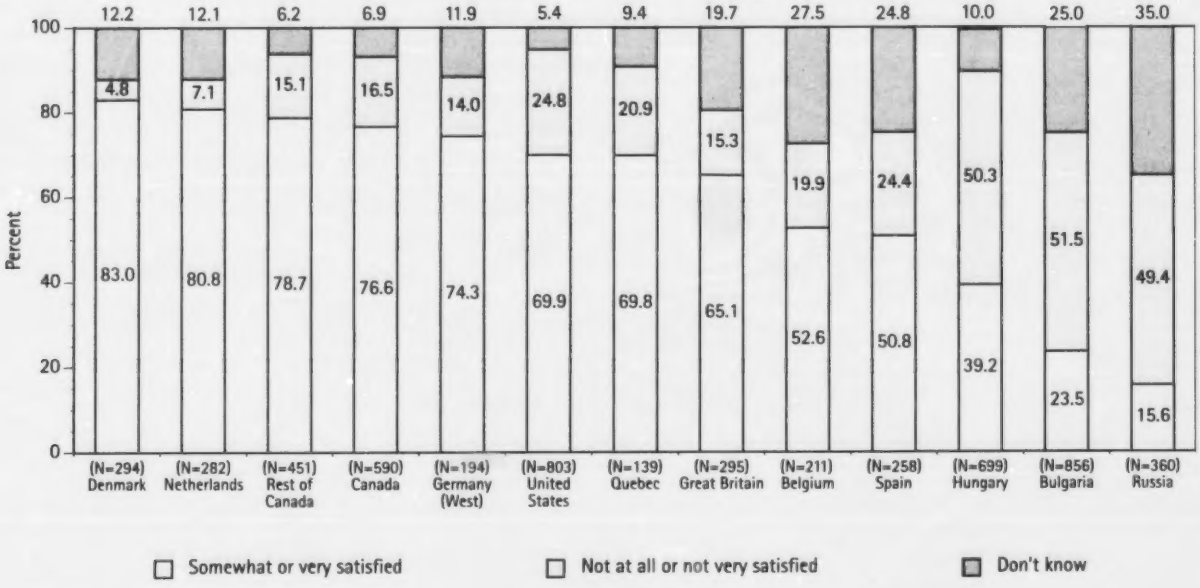
Another measure of high court support is provided by a question that asked respondents if they felt that *"the Supreme Court can usually be trusted to make decisions that are right for the country as a whole."* The results appear in Figure 12. Canada again sits near the top of the pack, with 73 percent of respondents in agreement with the statement. Most of the industrialized democracies are clustered close together on this question, with only the Netherlands showing a markedly elevated level of support. Interestingly, Quebecers also sit atop the pack on this question and are seemingly more supportive of the Supreme Court than other Canadians. Only 70 percent of respondents outside Quebec agree with the statement in question, compared to 82 percent within the province.

Figure 10
Awareness of National High Courts



Source for all except Canada: Gibson, Caldeira and Baird, "On the Legitimacy of National High Courts."

Figure 11
Satisfaction with National High Courts (among those aware of highest court)



Source for all except Canada: Gibson, Caldeira and Baird, "On the Legitimacy of National High Courts."

The latter finding contrasts with the results in Figure 11 on Court satisfaction, as well as the results for two other measures of high court support considered below. It also runs counter to the natural intuition of anyone who follows Canadian politics; Quebecers, surely, would tend to be less supportive of Canada's Supreme Court than other Canadians. A second look at the question wording sheds light on this anomalous result. The question asks whether the Court can be trusted to make decisions that are right for the country as a whole. This is meant to carry a positive connotation, but for some it may have negative overtones: if Supreme Court decisions are right for the country as a whole, this may mean they are detrimental to the interests and concerns of particular regions, like Quebec. Agreement with the statement does not, therefore, necessarily imply support for the Supreme Court. This reasoning is further corroborated when the Quebec results are broken down by partisan affiliation and we find that on this question, and this question only, Bloc Québécois partisans are more "supportive" of the Court — that is, more likely to agree with the statement in question — than other Quebecers. Given these quirks in the data, the results in Figure 12 should probably be treated with caution, since this particular question may not be as sound a measure of high court support as others we consider.

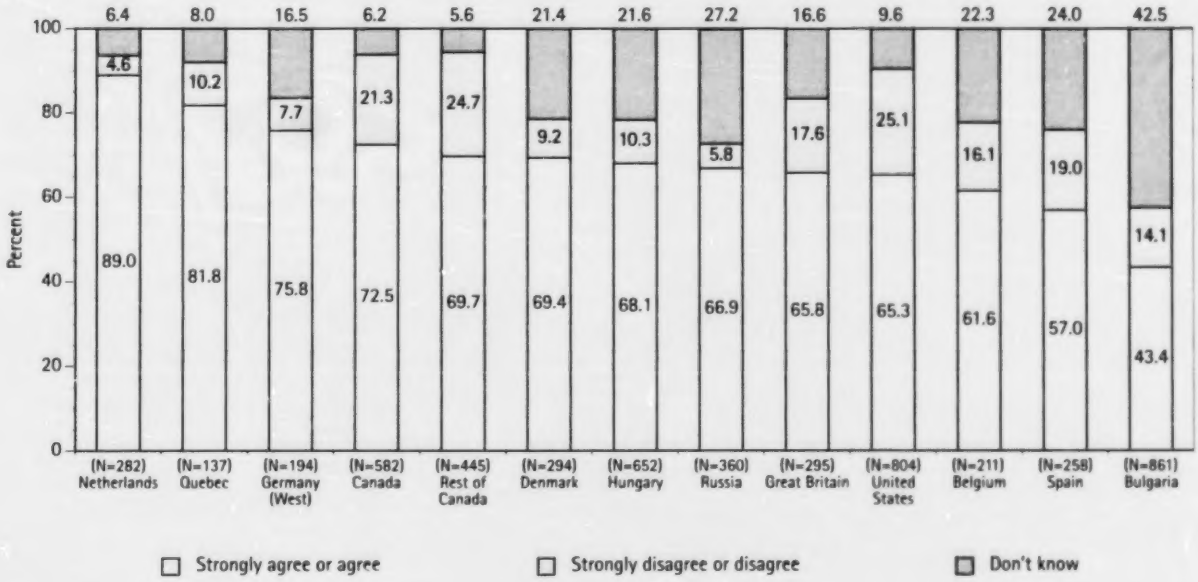
Canadians, then, are generally satisfied with the way the Court has been doing its job and (perhaps less significantly) believe it makes decisions that are right for the country as a whole. Despite this strong show of support, however, they are not opposed to the idea of reducing the Court's power. The survey asked respondents whether they agreed with the proposition that *"the right of the Supreme Court to decide certain controversial issues should be reduced."* The results, shown in Figure 13, reveal that Canadians are about evenly split on the idea: 42 percent agree, 43 percent disagree, while 15 percent are undecided. Again, there is a difference between Quebec and the rest of Canada on this question, with Quebecers in this case showing somewhat less support for the Court's right to decide controversial issues than other Canadians.

In other countries, there is greater resistance to the idea of reducing the power of the highest court. In the US, only 36 percent favour tightening the reins on the Supreme Court, while 53 percent are opposed. Hungary, Denmark, and the Netherlands show a similar division of opinion. Among those living in the former West Germany, support for leaving the highest court's authority untouched is even greater, with only 22 percent favouring a reduction compared to 58 percent opposed to the idea. On this count, then, Canadians are somewhat less supportive of their highest court, comparatively speaking.

The next question on the survey asked people whether they agreed with a more radical — albeit hypothetical — statement about altering the Supreme Court's authority: *"If the Supreme Court started making a lot of decisions that most people disagreed with, it might be better to do away with the Supreme Court altogether."* While this draconian proposition is clearly not part of serious public debate about Canada's Supreme Court, it nonetheless serves as a useful barometer of any acute discontent that might exist in the general public. It turns out, not surprisingly, that Canadians are significantly less apt to support this radical proposal than the more modest one noted above. Just over a third of Canadians agree with the idea of doing away with the court should it consistently run afoul of public sensibilities (36 percent), while a majority (53 percent) are opposed (see Figure 14).

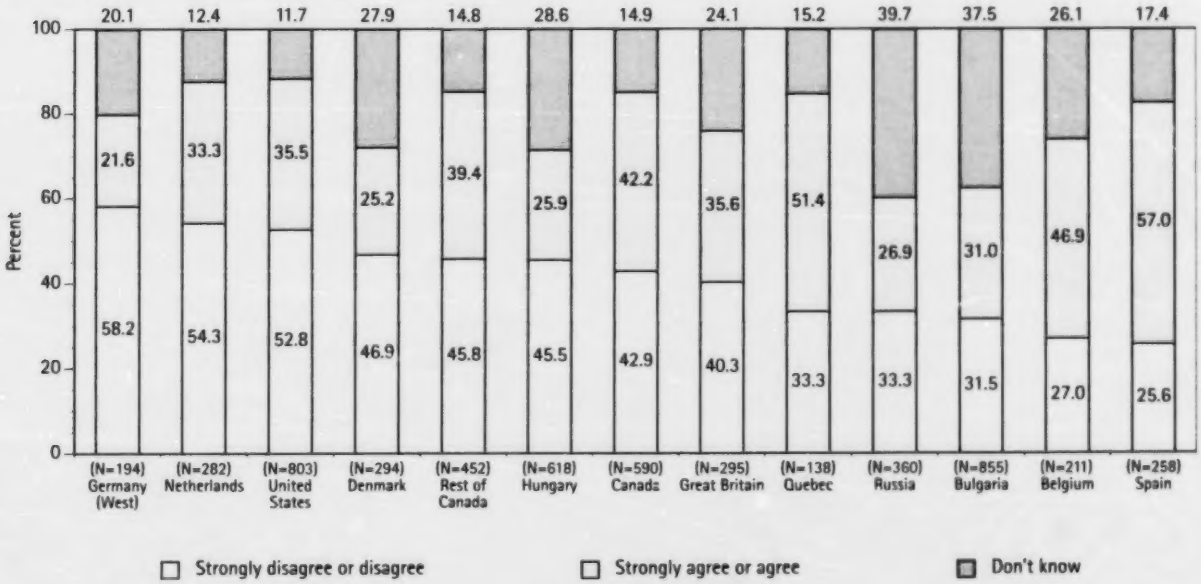
Of course, the same is true in most other countries: the radical proposal has less support than the more modest proposal to reduce the court's authority to rule on controversial issues. The upshot is this: Canadians show greater support for their highest Court in their responses to the radical proposal, yet still lie in the middle of the pack,

Figure 12
The Supreme Court Can Usually Be Trusted to Make Decisions That Are Right for the Country As a Whole (among those aware of highest court)



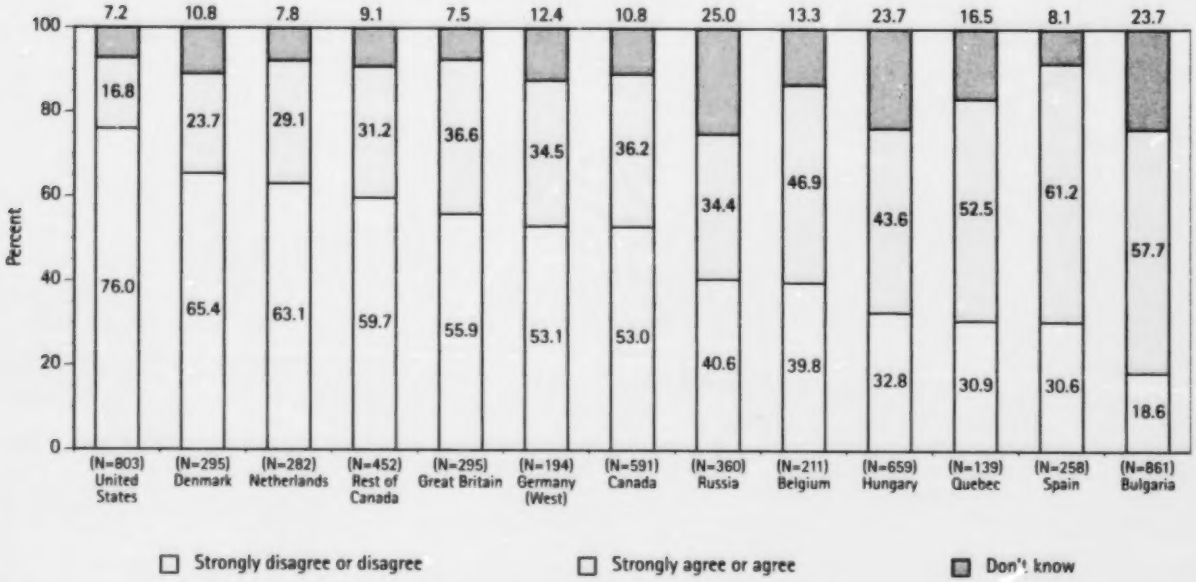
Source for all except Canada: Gibson, Caldeira and Baird, "On the Legitimacy of National High Courts."

Figure 13
The Right of the Supreme Court to Decide Certain Controversial Issues Should Be Reduced (among those aware of highest court)



Source for all except Canada: Gibson, Caldeira and Baird, "On the Legitimacy of National High Courts."

Figure 14
If the Supreme Court Started Making a Lot of Decisions That Most People Disagreed with, It Might Be Better to Do Away with the Supreme Court Altogether (among those aware of highest court)



Source for all except Canada: Gibson, Caldeira and Baird, "On the Legitimacy of National High Courts."

lagging behind other countries such as Denmark and the United States, where opposition to the idea of doing away with the highest court is more solid.

As with the other measures of Supreme Court support, however, a Quebec-ROC difference is apparent in Figure 14. Quebecers are markedly more open to the idea of eliminating the Supreme Court altogether if its decisions consistently run counter to Canadian public opinion. Indeed a majority support the idea, while only 31 percent are opposed. Outside Quebec, 31 percent support the idea and 60 percent are opposed; ROC is almost on a par with Denmark and the Netherlands, though still somewhat less supportive of their Court than the Americans. Caution is in order, due to the relatively small sample sizes involved, but the difference between Quebec and the rest of Canada is sufficiently large that it cannot be explained by random error alone.[15]

Understanding Attitudes toward Canada's Supreme Court

The differences between Quebec and the rest of Canada on these various comparative measures of support for highest courts clearly reveal a marked Quebec-ROC difference in attitudes toward Canada's Supreme Court. This contrasts with the uniformity in attitudes across the country on the earlier question concerning who should have the "final say" in cases of conflict, the courts or the legislatures (see Figure 8). On that question, Quebecers were just as likely to favour the courts as other Canadians. This inconsistency is something of a puzzle: why does Quebec stand apart on certain measures of support for the courts, but not on other, seemingly similar, ones?

The difference likely lies in the details of the question wordings. The earlier question asked respondents whether the "*courts*" should have the

final say when they rule a law *"unconstitutional on the grounds that it conflicts with the Charter of Rights."* The questions used in the comparative analysis in this section ask about the *"Supreme Court,"* and are less specific about the type of Court rulings in question, employing catch-all phrases such as rulings on *"controversial issues"* and *"decisions most people [disagree] with."* Both differences likely have an effect on responses. Mentioning the Supreme Court, rather than simply "courts," may evoke the image of federal power, since the Supreme Court is an important symbol and instrument of federal authority. And using catch-all phrases instead of asking specifically about the role of the courts in applying the Charter of Rights may invite some respondents to reflect on the Court's role in division of power cases and reference cases, such as the 1998 ruling on the legality of Quebec secession.

This reasoning may help explain why the comparative questions reveal considerable differences between Quebec and the rest of Canada. Federal authority and the Supreme Court's role in division of power and reference cases are contentious issues in Quebec. Many Quebecers likely oppose the Supreme Court not because it sometimes strikes down legislation passed by elected bodies, but because they reject federal authority. When presented with the more generic phrase, "the courts," Quebecers show they are just as supportive as other Canadians of the general principle of judicial authority.[16]

If Quebecers are less willing to extend support to the Supreme Court than to the courts more generally, the same also seems to be true of other Canadians with strong provincial attachments. The survey asked respondents how strongly attached they were to their province or region, on the one hand, and to Canada on the other. Their answers were used to group respondents into three categories: those more attached to their province than Canada, those equally attached to the two, and those more attached to Canada than their province.

The figures in Table 2 show responses to some of the courts questions broken down by strength of provincial-Canadian attachment. For the question concerning who should have the final say, the courts or the legislature, these attachments make no difference: those with strong provincial attachments are just as likely to pick the courts as other respondents. But for the two questions about the Supreme Court where Canada fares poorly compared to other countries, attachments have a considerable impact on respondents' evaluations. Those whose attachment to their province is stronger than their attachment to Canada are, in both instances, less supportive of the Court than other respondents (i.e. less likely to disagree with the statements in question).

These findings suggest that the Canadian results in our comparative analysis should be interpreted cautiously. In other countries, the questions about the highest court likely tap into the attitude they are principally designed to measure: support for the authority of courts to strike down legislation deemed incompatible with a bill of rights. In Canada, other issues of little significance elsewhere — federalism, regionalism and nationalism — conflate the results.[17] The same is probably true of Belgium and Spain, two other established democracies among the surveyed countries where regionalist discontent runs high. It is interesting to note that in Figures 11 to 14, these two countries consistently show lower levels of support for their highest courts than the other established democracies, including Canada.[18]

The upshot is this: there may be somewhat lower support in Canada (and other unstable federations) for the highest court of the land on certain measures, but this does not necessarily translate into lower support for the courts or the judicial branch more generally.

Table 2
Support for Canadian Courts by Provincial-Canadian Attachment

Response	Stronger provincial than Canadian attachment	Equal provincial and Canadian attachment	Stronger Canadian than provincial attachment
Courts not legislature should have final say			
% agreeing	70.7	62.2	61.5
N=	(183)	(444)	(369)
The right of the Supreme Court to decide certain controversial issues should be reduced			
% disagreeing	36.4	39.6	49.6
N=	(88)	(275)	(228)
If the Supreme Court started to make a lot of decisions most people disagree with it might be better to do away with it altogether			
% disagreeing	36.0	52.4	60.4
N=	(89)	(275)	(227)

Satisfaction with the Highest Court and Institutional Support

Returning to Figure 14, there is another noteworthy result. The deep opposition in the United States to the idea of eliminating the Supreme Court offers an interesting contrast with Canada (and indeed other countries too). It is only on this measure of court support that Americans come out on top. While they are reasonably satisfied with how their Supreme Court has been working (Figure 11), on the whole disinclined to reduce its right to decide controversial issues (Figure 13), and generally believe it makes decisions that are right for the country as a whole (Figure 12), Americans do not stand out on these measures as the most enthusiastic champions of their highest court. It is only when asked whether the court might be scrapped altogether that Americans truly rally round the bench.

This combination of attitudes likely has to do with the longevity of the American Supreme Court. Political institutions long in existence tend to have a reservoir of deep institutional support that helps them weather any ephemeral dissatisfaction with their performance that might arise from time to time. Of course, if this dissatisfaction continues for an extended period, it will gradually erode this deeply embedded support. But on the whole, older institutions that have performed passably well through their lifetime are better insulated against an erosion in legitimacy when dissatisfaction arises.

In one sense, Canada's Supreme Court is also of considerable vintage, having been part of Canada's governance structure for over one hundred years. But it is only since 1982 that it has started to play the sometimes controversial role of reviewing legislation to assess its compatibility with a constitutionally entrenched bill of rights. In this sense, it is a fledgling institution, and as such does not enjoy quite the same deep institutional support as the US Supreme Court. Given the

high levels of satisfaction with the way the Canadian Supreme Court has been working, one would expect, all else being equal, that Canadians would be less willing than people elsewhere to entertain the idea of eliminating their highest court. Instead, the relatively low levels of dissatisfaction in Canada translate more readily into a willingness to do away with the Court altogether. As a relatively young institution still establishing its presence and authority, Canada's Supreme Court, more than its American counterpart, must produce results satisfactory to the Canadian public or face some erosion in its institutional legitimacy.

But the matter should not be overstated. Canada is comparable to many other established democracies, where the Court's institutional legitimacy seems to be somewhat more contingent on satisfaction with its performance than is the case in the United States.

Summary of Cross-National Findings

The overall story that emerges from this comparative analysis is confirmation of considerable satisfaction with the courts in Canada. Canadians are relatively aware of their highest court and strongly supportive of how it has been working. On the question of eliminating the Supreme Court altogether, Canadians, especially outside Quebec, are also fairly committed to the Court, though somewhat less so than our American neighbours. However, when asked if they would like to see the Court's right to decide controversial issues reduced, Canadians do split down the middle, suggesting that support for Canada's highest court is somewhat softer than in a number of other countries. We would reiterate, however, that there is reason to think that a lower level of support for our Supreme Court on certain measures partly represents opposition to centralized, federal power rather than judicial power.

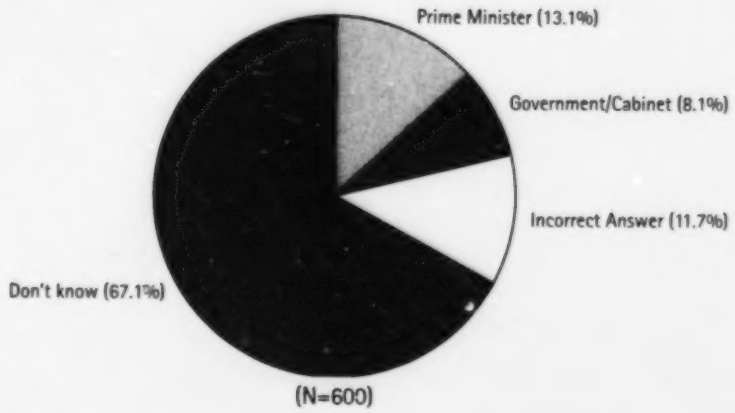
Appointing Supreme Court Justices

One potential court reform that has received some attention in Canada is altering the method of appointing judges to the Supreme Court of Canada. Currently the Prime Minister chooses them. There is, of course, some consultation with the Justice Minister and other officials behind closed doors, as well as a certain amount of lobbying from the legal community, but the final decision is the Prime Minister's.

Various alternative appointment methods have been proposed. Some would like candidates to be put forward by a nominating committee that would include representatives from constituencies such as the legal community, elected legislators and the lay public. Others would like to see parliamentary hearings held to assess a candidate's judicial philosophy and qualifications, akin to the Senate hearings that take place in the United States.[19] The Reform Party and others who advocate the decentralization of power would prefer that the provinces put forward nominations for the Court. Combined approaches — a nominating committee and parliamentary hearings, for example — have also been advocated.[20]

Before asking survey respondents their views on this issue, they were first asked whether they knew who currently selects judges for the Supreme Court of Canada. The results, shown in Figure 15, come as no great surprise: only 13 percent of Canadians know that it is the Prime Minister who makes the selection.[21] This finding is in keeping with the results of many surveys that have found Canadians are not especially well-informed about the detailed workings of their political institutions. The level of knowledge surrounding a particular issue is always an important mediating factor to bear in mind when assessing the likely impact of public attitudes on the political agenda.

Figure 15
Who Chooses the Judges for the Supreme Court?



Respondents were then asked the following question:

> Supreme Court judges are chosen by the Prime Minister. Some people think the provinces should be allowed to name them instead. Other people say the Parliament in Ottawa should hold hearings to help choose them. Who do you think should choose Supreme Court judges: the Prime Minister, the provinces, or Parliament?

The question did not offer combined methods as an alternative, though if respondents volunteered such a response, it was recorded as such. The objective was simply to get a rough sense of people's relative preferences for the different players that might be assigned a role in the appointment process.

The results, shown in Figure 16, clearly indicate that most Canadians would prefer some type of change to the current method. Only eight percent think the Prime Minister should choose Supreme Court judges. Nearly half would prefer that the provinces make the choice, while more than a third would like Parliament to be involved in the decision.

In assessing the significance of this result, however, it is important to come back to the awareness factor. Many Canadians may not like that the Prime Minister is responsible for Supreme Court appointments, but the overwhelming majority are unaware that this is the current selection method. It is not surprising, therefore, that this has been an issue at the margins of public debate, where it will likely remain despite persistent efforts to highlight the issue and stoke public discontent.

If discontent does rise, however, it is not clear that provincial input will necessarily be the reform of preference. For there are significant differences of opinion concerning appointment procedures among those with different levels of awareness about the Supreme Court – specifically, between those aware and those unaware of the current method of appointment. This is apparent in the results shown in Figure 17, where the data on appointment method preferences are broken down according to whether or not respondents were aware of how Supreme Court justices are chosen at present. Included in the aware group are the 79 respondents who said the justices are appointed by the Prime Minister and the 49 respondents who were not far off the mark in saying they are selected by the government or cabinet.

Among those unaware of the current method of appointment, over 50 percent think there should

Figure 16
Who Should Choose Supreme Court Judges?

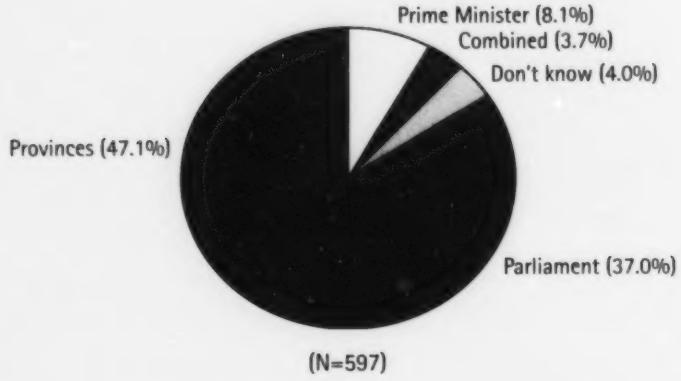
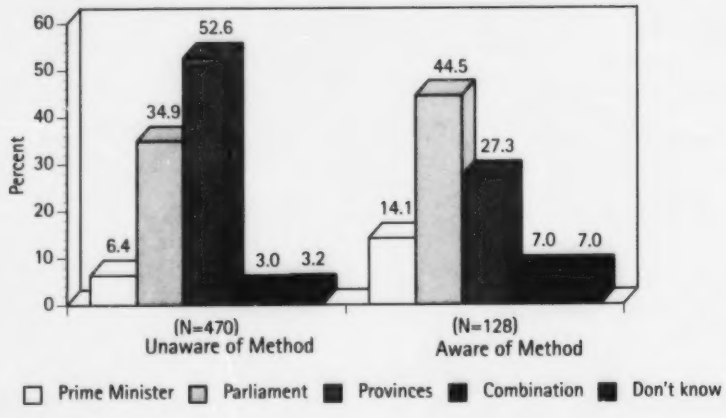


Figure 17
Preferred Appointment Method by Awareness of Appointment Method



be provincial input, while 35 percent think Parliament should make the choice. Among those who know how the judges are picked, however, just over one-quarter opt for the provinces, compared to 45 percent who choose Parliament. A further 14 percent think the Prime Minister should continue making the appointments, compared to only six percent among the unaware group. Breaking down the sample by awareness level makes the sample sizes rather small; nevertheless, it is highly unlikely that the observed differences are simply due to random error.[22]

The impact of awareness on appointment method preferences is likely to have some effect on any public debate that might unfold around the issue. Inevitably, such debate will be more heavily influenced by keen court watchers than less interested parties. We would anticipate, therefore, that the proposals most likely to get the wind in their sails are those calling for some manner of Parliamentary input to the appointment process.

Conclusion

These results from IRPP's national survey on the courts and the Charter of Rights shed considerable light on the ongoing debate over the role of Canada's judiciary in the Charter era. They suggest that staunch critics who decry the judicial activism they see in recent Supreme Court decisions and call for greater deference from the courts have yet to win Canadians over to their point of view. The Charter of Rights and Freedoms enjoys as much popular support as ever, as much as in 1987. At the same time, support for courts over legislatures, when the two are at odds, has remained steady since that date. It is still the case today that twice as many Canadians pick the courts over the legislatures, suggesting that the regular recourse to the notwithstanding clause advocated by some is not likely to win public favour. In light of all the publicity surrounding the courts lately, much of it negative,[23] it is noteworthy that Canadians continue to show strong respect for the right of the courts to strike down legislation they deem unconstitutional.

Based on these findings, there is no evidence that a groundswell of opposition to judicial authority is in the offing. Nor is there any strong indication that courts in Canada are less highly regarded than the courts in other countries. Canadians, if a bit more willing to consider reducing their highest court's right to rule on certain controversial issues, are relatively supportive of the Supreme Court on other measures. It is also important to remember that evaluations of Canada's Supreme Court likely represent a blend of two sentiments: feelings toward judicial authority and feelings about federal authority. In many other countries, this is not the case. Therefore, support for judicial authority in Canada — as opposed to the Supreme Court — is likely underestimated by our comparative data.

Still, there is room for reform. Canadians do feel that the method used to appoint Supreme Court justices is in need of alteration. Many Canadians would look favourably on some change to the appointment procedure — provincial input for some, Parliamentary input for others, especially the more highly aware. While this would probably not silence the most vocal critics of the courts, it would likely enhance public confidence in the judicial system. Giving other players some say in appointments to Canada's highest court would be one constructive response to critics' concerns about judicial power.

Appendix: Charter and Court Support, Socio-Demographic Cross-Tabulations

Table A-1
Attitudes toward the Charter, Socio-Demographic Cross-Tabulations

a) By Birth Cohort, 1987

	1970-81 (%)	1959-69 (%)	1947-58 (%)	1946 and earlier (%)
1987				
Good		70.2	67.7	68.7
Bad		2.6	4.8	6.4
Don't know		7.4	11.8	10.5
Not heard of		19.8	15.7	14.5
N=		(567)	(604)	(850)
1999				
Good	64.0	76.4	76.5	66.1
Bad	2.6	3.3	9.9	10.1
Don't know	11.1	6.9	7.8	11.6
Not heard of	22.2	13.4	5.8	12.2
N=	(189)	(305)	(294)	(189)

b) By Level of Education

	Finished high school (%)	Some post-secondary (%)	Completed university (%)
1987			
Good	60.5	75.5	86.1
Bad	4.6	5.1	5.3
Don't know	12.1	9.0	4.0
Not heard of	22.8	10.4	4.6
N=	(1147)	(587)	(303)
1999			
Good	67.1	71.7	84.0
Bad	5.6	8.1	4.9
Don't know	10.4	8.7	7.4
Not heard of	16.9	11.6	3.7
N=	(480)	(346)	(163)

c) By Sex

	Male (%)	Female (%)
1987		
Good	75.4	62.3
Bad	5.5	4.2
Don't know	8.0	11.9
Not heard of	11.1	21.5
N=	(991)	(1049)
1999		
Good	74.4	68.5
Bad	8.0	4.8
Don't know	6.3	12.4
Not heard of	11.2	14.3
N=	(489)	(502)

d) By Country of Birth

	Canada (%)	Other (%)
1987		
Good	68.2	70.9
Bad	4.9	4.8
Don't know	10.4	8.2
Not heard of	16.5	16.1
N=	(1707)	(330)
1999		
Good	72.7	63.8
Bad	6.4	7.1
Don't know	9.3	9.2
Not heard of	11.6	19.9
N=	(847)	(141)

Table A-2
Who Should Have the Final Say, Socio-Demographic Cross-Tabulations

a) By Birth Cohort

	1970-81 (%)	1959-69 (%)	1947-58 (%)	1946 and earlier (%)
1987				
Legislature		25.9	26.8	29.1
Courts		68.8	63.4	57.4
Don't know		5.3	9.9	13.5
N=		(189)	(213)	(289)
1999				
Legislature	32.1	28.5	31.1	31.6
Courts	62.1	64.3	62.9	56.1
Don't know	5.8	7.2	6.0	12.3
N=	(190)	(305)	(299)	(187)

b) By Level of Education

	Finished high school (%)	Some post-secondary (%)	Completed university (%)
1987			
Legislature	26.2	27.3	33.9
Courts	61.0	64.1	62.6
Don't know	12.7	8.6	3.5
N=	(385)	(198)	(115)
1999			
Legislature	27.3	31.8	36.0
Courts	64.0	59.8	59.1
Don't know	8.7	8.5	4.9
N=	(484)	(343)	(164)

c) By Sex, 1987

	Male (%)	Female (%)
1987		
Legislature	33.4	22.1
Courts	60.1	64.2
Don't know	6.5	13.7
N=	(341)	(358)
1999		
Legislature	34.7	25.9
Courts	62.5	60.9
Don't know	2.8	13.2
N=	(496)	(499)

d) By Country of Birth, 1987

	Canada (%)	Other (%)
1987		
Legislature	27.2	29.9
Courts	63.0	58.1
Don't know	9.9	12.0
N=	(578)	(117)
1999		
Legislature	30.7	28.5
Courts	61.6	61.8
Don't know	7.8	9.7
N=	(848)	(144)

1 For brief statements of the contending positions see the forum in *Policy Options*, Vol. 20, no. 3 (April 1999), pp. 6-39. For a more detailed treatment see, Joseph F. Fletcher (ed.), *Ideas in Action: Essays on Politics and Law in Honour of Peter Russell* (Toronto: University of Toronto Press, 1999).

2 The survey was commissoned by the Institute for Research on Public Policy; the questionnaire was developed by Paul Howe and Joseph Fletcher. The fieldwork was carried out by Opinion Search, an Ottawa-based polling firm and took place from March 1 to March 20, 1999. The sample size of 1,005 produces results accurate to within ± 3.1 percent, 19 times out of 20. Potential respondents were called up to ten times to try to secure an interview. The response rate of 30 percent, while low by the standards of an academic survey, is not uncommon for a commercial survey, as response rates have been declining in the past few years throughout the polling industry. In an effort to ensure that the comparisons we draw below with a 1987 academic survey are sound, we compared respondents in the earlier study who had been easy to reach with those more difficult to reach — and found no significant differences in their opinions. Thus, we can say with certainty that if the response rate in 1987 had been comparable to that of the current survey, there would have been no difference in the results. We can also say (with slightly less confidence) that had the response rate of the current survey been higher, the results would not have differed in any significant way.

3 Paul M. Sniderman, Joseph F. Fletcher, Peter H. Russell and Philip E. Tetlock, *The Clash of Rights: Liberty, Equality and Legitimacy in Pluralist Democracy* (New Haven: Yale University Press, 1996).

4 James L. Gibson, Gregory A. Caldeira and Vanessa A. Baird, "On the Legitimacy of National High Courts," *American Political Science Review*, Vol. 92, no. 2 (June 1998), pp. 343-58.

5 In 1987, these questions were asked of randomly selected half samples. In 1999, they were posed to the entire sample.

6 This question was used for a wording experiment in 1987, permitting a precise comparison with only one third of the 1987 respondents. See Sniderman *et al.*, *The Clash of Rights*, pp. 163-68.

7 The comparable figures for the national identity question are 72 percent and 95 percent. For the power of the provinces question they are 74 percent and 94 percent.

8 A comparison of this regional breakdown with figures from a November 1999 Angus Reid poll reported in *The Globe and Mail* (Kirk Makin, "Opinion Mixed on Power of Judges," *The Globe and Mail*, November 23, 1999, p. A5) reveals some interesting differences. Whereas we find the highest level of support for the courts in the Atlantic region, the *Globe* poll — which asked if people felt that judges in Canada have too much power — finds support in that region to be the lowest. And whereas we find support in BC to be lower than elsewhere, the *Globe* poll puts BC in the middle of the pack. Why these differences? Most likely, the apparent upswing in opposition in Atlantic Canada in the November 1999 poll represents dissatisfaction with the *Marshall* decision concerning aboriginal fishing rights (handed down in September), while the BC result in our March 1999 poll represents negative reaction to the *Sharpe* decision on child pornography handed down by the BC Supreme Court in January 1999. These regional fluctuations point to the significant impact specific cases can have on general attitudes toward Canada's courts and judges, a theme we take up in more detail in the second paper in this volume.

9 Essays on the role of the courts in various countries around the world can be found in C. Neal Tate and Torbjörn Vallinder (eds.), *The Global Expansion of Judicial Power* (New York: New York University Press, 1995).

10 A comprehensive summary of the results of many of these surveys can be found in James L. Gibson, Gregory A. Caldeira and Vanessa A. Baird, "On the Legitimacy of National High Courts," *American Political Science Review*, Vol. 92, no. 2 (June 1998), pp. 343-58.

11 A random sub-sample of 600 respondents was asked this particular set of questions. The margin of error for a sample this size is ± 4.0 percent, 19 times out of 20.

12 Given the samples sizes for Quebec and the rest of Canada, we would expect — were there, in reality, no difference between the two regions — to see a difference of less than nine percent, 19 times out of 20. The actual difference of over 40 percent far exceeds this margin or error.

13 We were concerned that this result might simply reflect nationalistic Quebecers willfully understating their awareness of the Supreme Court in order to make a political statement of sorts. To check if this was the case, levels of awareness among supporters of different federal political parties were examined. It was found that Bloc Québécois supporters were no more and no less aware of the Supreme Court than supporters of the other parties, which suggests there was no willful understatement at play.

14 See F.L. Morton, Peter Russell and Tory Riddell, "The Canadian Charter of Rights and Freedoms: a Descriptive Analysis of the First Decade, 1982-1992," *National Journal of Constitutional Law*, Vol. 5 (1995), Table 3, p. 9. For an update, see Patrick J. Monahan, "The Supreme Court of Canada's 1997 Constitutional Decisions: A Statistical Overview," *Canada Watch*, Vol. 6, nos. 4, 5, & 6 (October 1998), Table 6, p. 105.

15 More precisely, if there were, in reality, no difference between Quebec and the rest of Canada, we would expect to see a difference of less than 10 percent, 19 times out of 20. The actual differences of approximately 20 percent considerably exceed this margin of error.

16 The same is true of Bloc Québécois supporters: they support "the courts" as much as supporters of other parties, but are much less supportive of the Supreme Court.

17 These difficulties of interpretation and comparability are, of course, unavoidable. In order to even begin to draw comparisons between support for the courts in Canada and in other countries, use of identical question wordings is essential, even if caveats must be attached after the fact.

18 As a pair of disgruntled Basque nationalists noted recently: "We are seeing a judicialization of Spanish policy with respect to the Basque question...When we decide something, Madrid opposes it and refers the question to the Constitutional Tribunal, which always renders a judgment in its favour." Cited in Claude Lévesque, "Le Parti Herri Batasuna cite l'exemple irlandais," *Le Devoir*, May 28, 1999, p. A5 (translated by current authors).

19 Owen Lippert, "It's Time Parliament Reviewed Supreme Court Appointments," *Fraser Forum* (March 1998), pp. 24-25.

20 See for example, Peter H. Russell, "Reform's Judicial Agenda," *Policy Options*, Vol. 20, no. 3 (April 1999), pp. 12-15; and Jacob S. Ziegel, "Merit Selection and Democratization of Appointments to the Supreme Court of Canada," *Choices*, Vol. 5, no. 2 (June 1999).

21 Again, a sub-sample of 600 respondents was asked the set of questions about appointment procedures.

22 More precisely, if there were, in reality, no difference between the unaware and the aware groups, we would expect to see differences of less than 10 percent, 19 times out of 20.

23 Just prior to the survey there were two highly publicized incidents that might well have undermined Canadians' confidence in the courts. In January, the BC Supreme Court ruled, to much public outcry, that the law making possession of child pornography a criminal offence was unconstitutional, and in February, Alberta Court of Appeal Justice John McClung wrote his scathing missive to the *National Post* lambasting Madame Justice Claire L'Heureux Dubé for the commentary she attached to the Supreme Court's ruling in the *Ewanchuk* case. That these two incidents do not seem to have dented public confidence underlines the resilience of Canadian support for the courts.

Supreme Court Cases and Court Support: The State of Canadian Public Opinion

Joseph F. Fletcher

and

Paul Howe

Introduction

In our previous paper[1] we explored public attitudes toward the Canadian Charter of Rights and Freedoms and toward the Supreme Court of Canada. Generally speaking, we found that Canadians are aware of the Charter and the Court and hold them both in high esteem. These findings are important for they show that recent critical commentary on the Charter and the Court in both the popular and academic press has little resonance with the Canadian public.[2] This paper investigates why this is the case by examining what Canadians know and think about several recent and highly controversial Supreme Court rulings that figure prominently in contemporary Court and Charter criticism. A common theme in this criticism is that, thanks largely to the Charter, a newly activist Court often undercuts legitimate public preferences as expressed in ongoing legislative and executive practice.

Why then do Canadians hold the Charter and the Court in such high regard? Is it because, contrary to the intuition of many critics, Canadians actually approve of what the Court is up to? Or is

it perhaps, as some critics assume, that Canadians simply are unaware of the Court's rulings but would be outraged if they did know? Or, in a variation on this theme, perhaps Canadians do not draw close connections between their opinions on specific cases and their general assessments of their Court and Constitution.

As it turns out, all these perspectives contain some truth. First, it is true that Canadians are not all that aware of Supreme Court rulings. And when briefly apprised of the issues involved in a case, the majority sometimes disagrees with the Court, even to the point of being openly critical of the justice system. But this is not usually the case. On some high profile cases, the majority of Canadians stand firmly with the Court. Perhaps most importantly, however, the impact of specific assessments on general attitudes toward the Court and the Charter is not uniform. Court decisions enjoying widespread public approval do seem to generate support for both the Court and Charter. But on issues where most Canadians disagree with the Court, their attitudes do not translate into negative feelings toward either the Charter or the Court. Finally, awareness may have a mediating impact on these relationships, as it would appear that higher awareness levels can produce tighter connections between feelings about specific cases and more general attitudes.

In short, our investigation corroborates the view that support for the courts and the constitutional arrangements that empower them does relate to issues of the day, as reflected in the rulings of the Supreme Court.[3] But contrary to the hopes and expectations of adamant critics, recent decisions have not undermined the strong public support that exists for Canada's judicial institutions.

Specific and Diffuse Support

Our analysis is embedded in a more general theoretical framework that has been applied to a variety of political institutions to understand how legitimacy is built and sustained. In this approach, a distinction is conventionally drawn between specific support and diffuse support. The first refers to support for the policies and actions produced by a given institution. The second refers to support for the institution itself. Typically, the supposition is that specific support is quite variable, while diffuse support is more stable and somewhat insulated from the vagaries of specific support.[4]

This theoretical framework has been used to analyze support for high courts in other countries, the United States in particular.[5] When applied to judicial institutions, specific support is usually conceived as attitudes toward specific cases or issue areas where the courts have ruled. Early US findings suggested that specific and diffuse support were closely linked — a worrying finding for many since it suggested that a surfeit of unpopular decisions could seriously undermine the basic legitimacy of the US Supreme Court.[6] More recently, however, Caldeira and Gibson have suggested that measurement problems may bias these results. In particular, they persuasively argue that the questions used to tap diffuse support, such as "how well the court is doing its basic job" essentially ask for aggregate assessments of the Court's performance, and thus likely measure specific and not diffuse support. Their suggestion: "To capture the enduring components of public evaluations of the Court, we need to pose respondents with tough questions about their willingness to accept, make or countenance major changes in fundamental attributes of how the high court functions."[7] Devising a battery of such questions, Caldeira and Gibson arrive at novel results: "For the mass public, contrary to previous research, we find no connection between support for specific policies and diffuse support for the Supreme Court."[8]

In using their new battery of questions to measure diffuse support, Caldeira and Gibson nevertheless persist in using a single item indicator of

specific support due, they say, to a lack of resources.[9] More recently, Gibson and Caldeira, working with Vanessa A. Baird, again use a single question to measure specific support.[10] They also introduce a new battery of indicators for diffuse support. Thus armed, they now find connections between specific and diffuse support across a variety of different countries, including the United States. Yet their single item indicator of specific support is worrisome. As they note, "our measure of specific support may be systematically contaminated with traces of diffuse support...our measure may come close to encroaching on diffuse support, or it may tap an orientation somewhere between diffuse and specific support."[11]

Bearing in mind the measurement problems of the foregoing work, the overall approach of this paper is to investigate whether diffuse support for Canada's Supreme Court is related to specific support for its rulings. In doing so we intend to conceptualize diffuse support broadly, using a range of measures including those developed by Gibson and his colleagues. Specific support is more narrowly conceived in terms of attitudes toward specific cases on which the Supreme Court has ruled. Public attitudes toward a number of recent prominent decisions of the Court thus serve as indicators of specific support.

Along the way, we uncover differences among the various indicators of diffuse support employed in the analysis. These differences were touched on in our previous paper and are further explored here. In particular, we confirm our earlier finding that some of the measures currently in use tap at least partly into feelings about the central state while others touch more upon attitudes toward the practice of judicial review. This finding suggests that the search for sound measures of diffuse support is not yet over and that caution should be taken in attempting cross-national comparisons of support for high courts.

Data

Our data are drawn from a national survey of Canadians commissioned by the Institute for Research on Public Policy and conducted in March of 1999.[12] In addition to questions specifically written for this study, we replicated numerous items from the 1987 Charter Project to permit Canadian comparisons across time.[13] Furthermore, as noted above, several of the questions James Gibson and his colleagues have devised to draw cross-national comparisons of specific and diffuse support for national high courts were also added to the questionnaire, thus enhancing the comparative value of our work.[14]

Liberty, Equality and Legitimacy before the Supreme Court of Canada

The cases selected for study here are among the most controversial in recent Canadian jurisprudence. They touch upon fundamental aspects of liberty, equality and political legitimacy in modern Canadian life. They were selected because of the substantial publicity surrounding each and their considerable influence on debate over judicial politics in Canada. As such they are not necessarily representative of the larger docket of items handled by the Supreme Court of Canada. Nevertheless they do represent three main areas of jurisprudence.

The first set of cases touches on freedom from unreasonable search and seizure, the second case on equality in employment opportunity and the third on the legitimacy of the secessionist enterprise in Quebec. The cases also involve different types of Supreme Court activity. The first involves the judicial oversight of police action, the second involves judicial review of provincial legislation, and the third is a reference case where the sitting government asked the Court's advice on a pressing

constitutional matter. While the focus in what follows is primarily upon questions asked about the issues raised in these particular cases, we will also from time to time take advantage of other questions in the survey that lend some further perspective to the issues at hand. In particular, we draw comparisons between the current survey results and those from the 1987 Charter Project to assess changes in attitudes that help shape opinion on Court cases.

Freedom from Unreasonable Search and Seizure: *R. v. Feeney*[15]

A police officer investigating the murder of Mr. Frank Boyle on the morning of June 8, 1991 went to Michael Feeney's place of residence, an equipment trailer. He knocked but when the door was not answered, he entered. Finding Mr. Feeney asleep, the officer woke him and told him to move to a brighter area at the front of the trailer where he could ask him some questions. Upon observing blood on Feeney's shirt, the police officer seized the shirt and took Feeney to the local police detachment for further questioning. The officer had no warrant and Feeney had no lawyer. Based upon the interrogation, a warrant to search Feeney's trailer was obtained and additional incriminating evidence was found there the following day. At trial, the evidence against Feeney was admitted and he was found guilty of second degree murder.

Feeney appealed under the Charter. The core issue was whether Feeney's shirt and such should have been admissible as evidence in court or excluded. The relevant section of the Charter is 24(2) which requires that evidence "obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter...shall be excluded..." Bearing on this core question is whether Feeney's Charter rights were violated, in particular his section 10 right to counsel and his section 8 right against unreasonable search and seizure.

On May 27, 1997, the Supreme Court handed down a split (5-4) decision that the police had violated Feeney's rights. Decisive in the Court's determination was an exchange at the trial revealing that prior to entering the trailer the police officer had no reasonable grounds for making an arrest.

> Q: And at that point, as you are going to the trailer, you would agree with me you had no intention of arresting Mr. Feeney?
>
> A: No, I just wanted to check what he had been doing.[16]

The majority ruled that "arrests made in private dwellings must be carried out with respect for individual rights and especially the right to be secure against unreasonable search and seizures." Moreover, the Court ruled that "once the officer touched the accused's leg and ordered him to get out of bed" his rights under section 10(b) of the Charter "to retain and instruct counsel without delay and to be informed of that right"[17] were engaged. The Court further applied the standard remedy prescribed by the Charter for such violations: it excluded the evidence.

The *Feeney* case has strong similarities to one of the earliest Charter cases, *R. v. Therens*.[18] The case concerned a Mr. Paul Therens who, one April evening, drove his car into a tree alongside a street in Moose Jaw, Saskatchewan. Police officers arriving at the scene asked him to take a breathalyzer test, without ascertaining if he would like to consult a lawyer. Back at the station, the breathalyzer results showed that Mr. Therens had a blood alcohol level well in excess of the legal limit. In those very early days of the Charter, the police thought that in requesting a breath sample they were not actually "detaining" Mr. Therens. Consequently, in their view they were not required to inform him of his right to counsel because the Charter stipulates that the right is triggered "upon arrest or detention."

The Supreme Court instructed otherwise. In its (6-2) ruling, the Court confirmed the rulings of two lower courts excluding the evidence from Therens' breathalyzer test on the grounds that he had been detained and had not been informed of his right to counsel.

In 1987, we asked a general question about the right to counsel and found very nearly unanimous support among Canadians for the right of a person who has been arrested or detained by the police to consult a lawyer. Using a question based on the *Therens* case, we further learned that support for the right to counsel plummets when an infringement of this right entails, as the Charter requires, the exclusion of evidence in court.

Since the general question about the right to consult a lawyer had produced no variance in 1987, we repeated only the more specific question. This question — based upon the facts of the *Therens* case — weaves together concerns over the exclusionary rule contained in section 24(2) of the Charter as well as the right to counsel in section 10. It reads as follows:

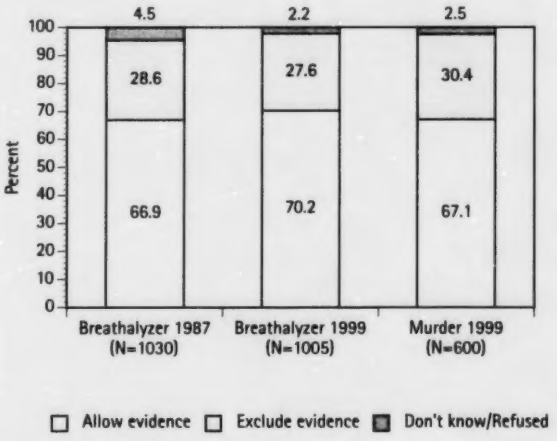
Consider this case: The police asked an obviously drunk driver to take a breathalyzer test without telling him that he had a right to consult a lawyer. Should a judge allow the breathalyzer evidence to be used in court or should he exclude it even if the driver may go free as a result?[19]

The results for 1987 are presented in the first column of Figure 1.[20] What we see is that two-thirds of our sample indicated that the breathalyzer evidence should be allowed in court. Just over one-quarter agreed with the Court that it should be excluded. When we repeated the *Therens*-based question in 1999 we found essentially the same results, as shown in the second column of Figure 1. Clearly, things are little changed by the passage of a dozen years. Most Canadians believe that evidence obtained in a situation like *Therens* should be admissible in Court. Relatively fewer say that the evidence should be excluded at trial.

A question concerning the exclusion of evidence loosely based on the facts of the *Feeney* murder case produces, once more, almost identical results. The results appearing in the third column of Figure 1 were obtained using the following question. *Consider this case: A murder suspect is inside a house that has been surrounded by the police. The police are supposed to wait for a warrant before entering the house, but instead they go in immediately and find clear evidence that the suspect committed the crime. Should a judge allow this evidence to be used in court, or should he exclude it?* Again, two-thirds of Canadians say the evidence should be allowed in Court, and roughly one third say it should be excluded. Very few reply they do not know or refuse to answer the question.

The data in all three columns suggest that the Court's exclusion of evidence in these cases is clearly counter-majoritarian. It thus makes some sense that critics of judicial activism might seize upon the facts of a case like Feeney's to lambaste the Court and the Charter that inspires such rulings.[21] They reasonably assume that most Canadians, if aware of the Court's actions, would not be pleased.

Figure 1
Should Improperly Obtained Evidence be Allowed in Court?



There is yet another provision of the Canadian Charter of Rights and Freedoms that bears on the matter of excluding evidence. The test laid down for the exclusion of evidence in section 24(2) of the Charter is whether the admission of the evidence "would bring the administration of justice into disrepute."[22] The Court has determined that what brings the administration of justice into disrepute "is a question of law which may be determined by a court without evidence of the actual or likely effect of such admission on public opinion." However, given our objective — to assess how public opinion on specific cases affects diffuse support for judicial institutions — the attitudes of the general public on such matters are relevant.

In both the 1987 and 1999 surveys, we decided to ask respondents to our *Therens* (drunk driver) scenario whether they would think less of the justice system were the judge to act in a way contrary to their view. Accordingly, those who thought the evidence should be allowed in court were asked: *If the judge decides the breathalyzer evidence should not be allowed in court, would you think less of our system of justice?* We see in Panel A of Figure 2 that nearly seventy percent in 1987 and seventy-seven percent in 1999 say yes, they would think less of our justice system if a judge excluded the evidence. These results suggest a considerable gap between the reasoning of the Court in cases like *Therens* and *Feeney* and the way the public thinks about these matters.

But what about those on the other side of the issue, the minority of Canadians who believe that in cases like *Therens* or *Feeney* the evidence should be excluded? How would they feel if things went the other way and the judges of Canada were allowing improperly obtained evidence to be used in trials? Would they think less of our system of justice? The answer is available in the Panel B of Figure 2. It presents the results obtained from respondents who agreed that the breathalyzer evidence should be excluded when subsequently asked: *If the judge decides that the breathalyzer evidence should be allowed in court, would you think less of our system of justice?*

These results show that Canadians who agree with the Court's stance are more or less evenly split on whether they would think less of the justice system if the judges were in fact to allow the evidence in court. In 1987, respondents who would think less of the system outnumber those who would not by a very narrow margin. In 1999, the balance of opinion appears to have shifted slightly in favour of those who would not think less of the system of justice.[23] But in both years, an important comparison holds true: the minority that backs the Court's position would be less aggrieved by a ruling contrary to their own position than is the majority that disagrees with the Court's actual stance.

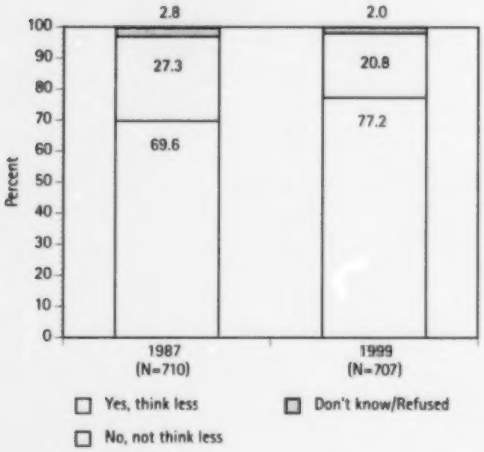
Given the results thus far, it seems that the Court's rulings on the exclusion of evidence are beyond the pale for most Canadians: the Court's reasoning is precisely the reverse of their own. In this regard, the Court seems very much counter-majoritarian.

Yet, the situation is not so thoroughly bleak for civil libertarians as the foregoing data suggest. Another question asked in both the 1987 and 1999 surveys suggests a small bit of promise on the civil liberties horizon. The question used is loosely based on the *Collins* case,[24] another instance of unreasonable search and seizure, according to the Court. But, in contrast to the previous items, the question focuses not on the exclusion of evidence issue but on whether a police search is reasonable. And the difference in focus lends a different nuance to the results.

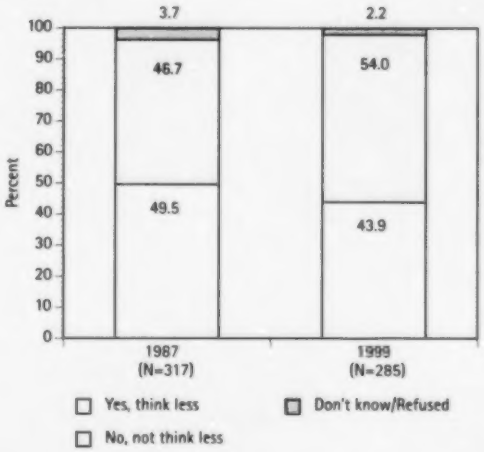
In *Collins*, the accused successfully argued for the exclusion of evidence about drugs she was carrying. As with *Feeney*, her contention was that the police search was unreasonable, for the officer had no legitimate grounds for suspecting that she was carrying drugs. Our question was designed to depict a search and seizure scenario that legal professionals would identify as unreasonable. In fact, samples of lawyers, Crown attor-

Figure 2
Attitudes on the Exclusion/Inclusion of Evidence

Panel A: Think less of the justice system if evidence is excluded?



Panel B: Think less of the justice system if evidence is allowed?



neys and ministry of justice officials had no trouble doing so in 1987. In this instance we had the interviewer say to the respondent: *I would like you to consider now an instance where the police see a young man they do not recognize walking very near a house where they know drugs are being sold. They search him and find he is carrying drugs. Do you think this search is a reasonable search, or does it violate the young man's rights*? The tip off here is in the phrasing "they do not recognize." To a legal professional this is an indication that the search is likely not a reasonable one by current Canadian standards.

How do Canadians react to this question? The results presented in Figure 3 show that compared with 1987, Canadians are now less likely to see a search of this kind as reasonable. To be sure, the majority still finds the search acceptable, but the majority is more slender than it was a dozen years ago. A hopeful civil libertarian may see here some evidence of a growing public attachment to our basic legal rights.

This perspective receives some further support by looking at the inter-relations among the attitudes on the cases we have been considering thus far. The correlation matrix in Table 1 provides the most compact way to present these results.

The strong correlation in attitudes across the *Therens* and *Feeney* cases makes it clear that responses to the two exclusion of evidence questions are fairly consistent. By contrast, there is a much lower level of correlation in attitudes

Figure 3
Do Canadians Regard Unlawful Search as Reasonable?

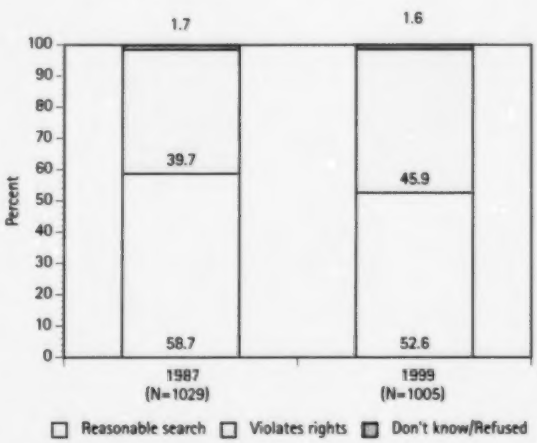


Table 1
Correlations Among Attitudes in Search and Seizure Cases
(1987 above the diagonal, 1999 below the diagonal)

	Therens	Feeney	Collins
Therens	--	--	.128
Feeney	.395	--	--
Collins	.265	.189	--

between the exclusion of evidence question per *Therens* and the search and seizure question per *Collins*. The coefficient for the *Feeney-Collins* pair is lower still. These lower values are due in part to the overwhelming majority on both the *Therens* and *Feeney* questions who favour allowing the evidence into court. The one pairing on which we have data from both survey years, *Therens-Collins*, is particularly instructive: the correlation is substantially higher in 1999 than in it was in 1987 (.265 vs .128). This suggests that attitudes on these basic civil liberties questions are growing more consistent with the passage of time, a possible sign of increasing public sophistication regarding legal rights.

The detailed results set out in Table 2 provide a closer look at the growing consistency in attitudes on freedom from unreasonable search and seizure using the data for the *Therens* and *Collins* cases. Crosstabulating the 1987 data with the 1999 results, we see how the passage of time has led to greater consistency in attitudes across these two scenarios. Those who see a search in a *Collins*-based situation as reasonable are more likely in 1999 than in 1987 to allow the evidence in court in a *Therens*-like situation (83.0 percent vs. 74.4 percent). And those who see a violation of rights in the search situation are more likely now than in the past to say improperly gained evidence should be excluded (40.8 percent vs. 37.6 percent). Yet these figures offer cold comfort for civil libertarians, since they indicate that consistent disagreement with the Court is increasing faster than consistent agreement. Indeed, growth in consistent opposition to the Court's rulings has outpaced the increase in consistent support three to one. And absolute levels of consistency among those who disapprove of the Court's decisions are roughly twice what they are among those who approve.

So, grounds for optimism on the civil libertarian side of these issues is very slim indeed. What we see instead is overwhelming evidence of opposition to judicial decisions on these questions of basic civil liberty. Canadians for the most part do not concur with the actions of the Court. And from what we have seen, most Canadians are unlikely to think well of the Court as they learn more about these cases. Before looking closely at how these results relate to diffuse support for Canada's judicial institutions, we turn to another recent ruling by the Court, this time in the area of equality.

Equality in Employment: *Vriend v. Alberta*[25]

Delwin Vriend began working in 1988 as a chemistry lab instructor at Edmonton Alberta's King's University College (a post-secondary college affiliated with the Christian Reformed Church). In early 1990, officials at the school learned that Mr. Vriend was openly living as a homosexual. The college subsequently developed a position on homosexuality as contrary to its code of conduct. The school president asked Vriend to resign in 1991. When he refused, he was fired for not complying with the college's policy on homosexuality. Vriend complained to the Alberta Human Rights Commission only to discover that homosexual behavior was not protected under the provincial human rights code. Indeed, the government had repeatedly refused to add sexual orientation to the code even following recommendations

Table 2
Growing Consistency in Attitudes from 1987 to 1999: Crosstabulations of Attitudes toward the Exclusion of Evidence in a Drunk-Driving Case (Therens) with the Reasonableness of a Search and Seizure (Collins)

		Search & Seizure à la Collins			
		1987		1999	
		Reasonable	Violation	Reasonable	Violation
Evidence	Allow	74.4	62.4	83.0	59.2
Per Therens	Exclude	25.6	37.6	17.0	40.8
	N=	(305)	(194)	(519)	(451)
	Phi=	.13; p = .004		.27; p = .000	

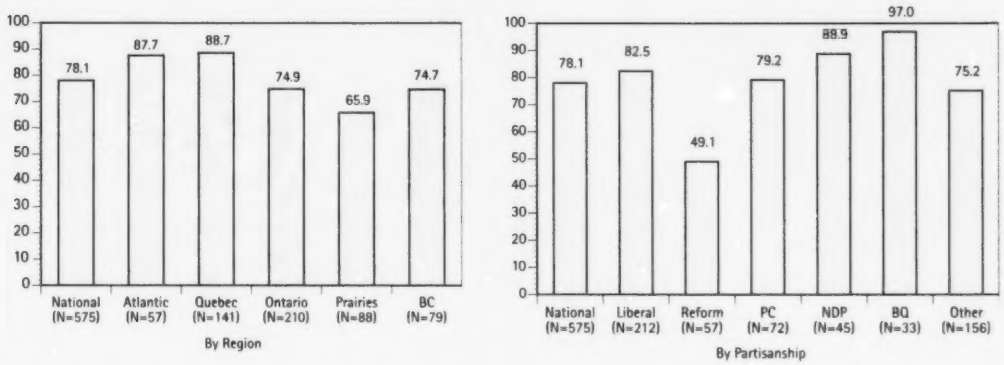
from the Alberta Human Rights Commission in 1984 and again in 1992. Vriend filed suit against the province. An Alberta lower court ruled in Mr. Vriend's favour, ordering Alberta to "read in" sexual orientation to its provincial human rights code, much as the Supreme Court subsequently "read in" sexual orientation to the Charter as a forbidden ground for discrimination, akin to race and sex, in a May 1995 ruling.[26] The Alberta Court of Appeal though overturned the lower court ruling in a 2-1 decision, affirming the provinces right to step "back from the validation of...sodomy as a protected and fundamental right."[27]

The Supreme Court's decision in the *Vriend* case came in November of 1998. Through it, the Court made it clear that provincial human rights codes must mirror the Charter as the Court now reads it. Thus the Court ordered (8-1) the Alberta provincial government to add sexual orientation to the list of characteristics specifically protected under the province's human rights law. It argued that "in excluding sexual orientation from [the Individual's Rights Protection Act] protection, the government has, in effect, stated that 'all persons are equal in dignity and rights' except gay men and lesbians. Such a message, even if it is only implicit, must offend [the equality rights section of the Charter]" because it "sends a message to all Albertans, that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation."[28]

The decision met with vehement public reaction in Alberta, with thousands of phone calls and letters to the Premier's Office. So swift and strong was this apparently widespread negative public reaction that many observers expected the Alberta government would use the Charter of Rights notwithstanding clause (section 33) to override the Court's decision. In the end this did not happen. After some apparent wavering on the matter, Alberta Premier Ralph Klein declared: "I will accept the ruling, I think it's morally wrong to discriminate on the basis of sexual orientation."[29] After a heated meeting with his caucus, Klein reported that no more than a third of his MLAs backed the use of the notwithstanding clause.[30] The Premier took pains to calm the uproar and characterize the decision as narrow in scope. As he put it, "All the Supreme Court decision has done is give people the right to go to the Alberta Human Rights and Citizenship Commission with a complaint in the areas of employment, rental accommodation, public services and public notices on the grounds of sexual orientation."[31]

We began discussing this case with our respondents by asking how much they had heard about the

Figure 4
Providing Protection for Gays in Provincial Human Rights Legislation, 1999 (Percent agreeing)



Three percent who replied "don't know" and one percent refusals have been excluded from this table. Including them would bring the national 'agree' figure to 74.8 percent.

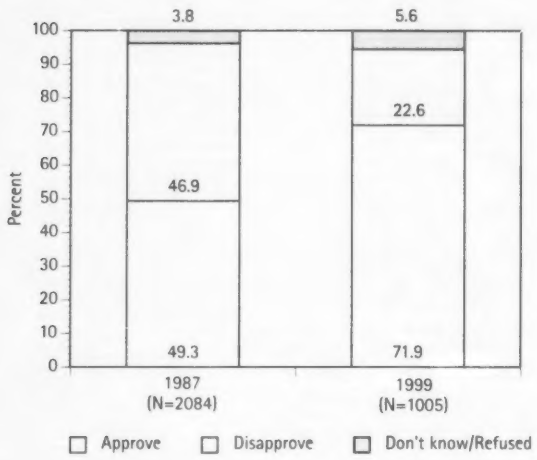
Vriend decision. Our question was: *The Supreme Court also issued a ruling not too long ago in the case of Delwin Vriend, a teacher who was fired from his job at a private religious school because he is gay. Have you heard a lot, a little, or nothing at all about this ruling?*

Fewer than 10 percent of Canadians reported hearing a lot about the *Vriend* case, and 30 percent said they had heard a little. A full 60 percent admitted they had heard nothing at all about the case. Despite the publicity and the uproar, the decision was obviously not widely known among Canadians. There are clear differences on this count, however, across regions and partisan groupings. Where the case arose, on the Prairies, the number who had heard a lot about the case approached 15 percent, while among Reform party identifiers it was slightly over 20 percent.

Respondents were next asked whether they agreed or disagreed with the Court. Our wording was as follows: *In its decision, the Court ruled that a province must provide protection for homosexuals in its human rights legislation. Thinking about this ruling, would you say that you agree or disagree?* Our results are in Figure 4.

The first thing to note is a substantial majority of Canadians support the decision rendered by the Court in the *Vriend* case.[32] Moreover, a majority in every region of the country favours the Court's ruling. There are regional differences, to be sure, with those living in Quebec most favourable to protecting the rights of gays and lesbians and those on the Prairies least favourable.[33] Similarly, when we break down responses by party affiliation, supporters of the BQ and NDP stand out as most in accord with the Court, while Reform supporters, evenly divided on the issue, are at the other extreme (the sample sizes are small, but the differences between these groups are large and statistically significant). Interestingly, too, awareness of the case makes no difference to opinion about the case: levels of support for the decision are the same among those who had heard nothing of the decision as they are among those who had heard a little or a lot (results not shown here). Such results perhaps highlight the political wisdom of Premier Klein's acceding to the Court's will in the *Vriend* case, despite the vocal protests.

Figure 5
Changing Attitudes toward Gay Teachers



The Supreme Court's decision in the *Vriend* case clearly forced the hand of Alberta's government on the issue of gay rights. And the ruling had a real impact on other provincial legislatures as well. Shortly thereafter, Newfoundland and Prince Edward Island, the two provinces that had not previously guaranteed equal protection for gays, quickly amended their provincial human rights codes. For critics, these political consequences of the Supreme Court decision represented a judicial trumping of legitimate provincial policy choices, but our findings of popular majorities concurring with the Court suggest otherwise. The legislatures that had refused to protect gay rights through human rights legislation were clearly out of line with public attitudes.[14]

The widespread support for gay rights manifested in public opinion on the *Vriend* ruling is a relatively recent development in Canadian society. This is the conclusion suggested by some comparisons across time we are able to draw, thanks to a general question we asked in 1987 which was available for replication in 1999. In both surveys we asked: *Do you approve or disapprove of allowing homosexuals to teach in school in (respondent's province)?* The results are presented in Figure 5.

What we see here is very nearly a sea change in attitudes toward gay teachers in Canada. A more than 20 point increase in support in twelve years is very significant, perhaps even more so politically than statistically. The rough 50-50 split on this issue in 1987 left open the democratic viability of discriminatory practices like that faced by a Delwin Vriend. The heavy preponderance of opinion today accepting and indeed approving gay teachers in schools presents political leaders with an entirely different political climate, one in which prejudice and discrimination are simply no longer acceptable.

Repeating survey items makes it possible to consider whether such change is due to: a) consistent attitudes at the individual level, combined with population turnover in which those being replaced have different attitudes from those replacing them; b) change at the individual level; or c) the two processes in combination.[15] The simplest way to do this is to separate respondents by birth cohort as we have done in Table 3. These data suggest that both processes are likely at work. For each survey year there are differences in support for gay teachers across birth cohorts. Those born later are more likely to approve of allowing homosexuals to teach in the schools of their home province, indicating that population turnover is one source of change. And comparing across surveys we find within birth cohorts that there is now greater support for gay teachers than there was in 1987, suggesting that individual change is also taking place.

The differences do not however appear to be uniform. All the cohorts, save one, show a substantial jump from 1987 to 1999. Notably, the responses of those born in the 1930's do not seem to differ between the two samples. Moreover, a sharp increase in support for gay teachers between the 1930's and 1940's cohorts in the more recent sample is not apparent in the older sample. But these observations should be treated with caution, since the gathering of respondents into decade-

Table 3
Percent Support for Gay Teachers by Birth Year Cohort

		Year of Birth								
Year of Survey		Pre-1910	1910-1919	1920-1929	1930-1939	1940-1949	1950-1959	1960-1969	1970 and after	Total
1987	% Agree	15.6	26.7	32.1	49.0	52.6	58.4	59.1	--	51.6
	N=	(32)	(86)	(193)	(239)	(422)	(500)	(516)	--	(1988)
1999	% Agree	--	53.8	45.8	50.9	71.2	79.7	78.9	86.4	76.6
	N=	--	(13)	(24)	(57)	(125)	(208)	(270)	(184)	(935)

long clusters to permit a tabular display means that the sample sizes for some cohorts are small.

An alternative approach is to use the full range of birth year values in conjunction with linear decomposition techniques.[36] Based upon multiple regression, this approach also enables us to estimate the relative influence of individual (intra-cohort) attitude change versus population turnover (cohort replacement) on overall attitudinal change. Using this technique we learn that the apparent curvilinear elements of Table 3 turn out to be not very substantial when the full range of birth years is employed. More substantively, we also find that most of the overall increase in support for gay teachers (approximately three-quarters) is due to individual change, while much less (about one-quarter) is attributable to cohort replacement.[37] Furthermore, as is clearly evident in Table 3, the two elements of change operate in the same direction.[38] That is to say, they reinforce one another. The result is that aggregate change outpaces individual change, making it seem to many of us that the general climate of opinion is changing more rapidly than we are.

It is clear that a consensus has emerged among the Canadian public in favour of equality rights for homosexuals generally, and particularly in the area of teaching in schools.[39] As part of this trend, an education gap observed in 1987 has narrowed: over the past dozen years, greater increases in support for gays among the less well-educated mean that a majority of those with a high school degree or less are now also supportive.[40] And while there remains a stable gender gap, very substantial majorities of Canadian men (70 percent) and women (83 percent) support the rights of gay teachers.[41]

And while the change has been rather general, attitudes do vary somewhat across geographic and political spectra as seen in Table 4. On a geographic basis the biggest changes have come in Atlantic Canada where levels of support were lowest in 1987, but gains have been appreciable in every region of the country.[42] The result is that while Quebecers are most supportive and those from the Prairies least, in every region at least two-thirds of the people endorse the right of gays to teach in their schools.[43] In terms of partisanship, there is a sharp cleavage on the issue of gay teachers, but the differences lie simply in the degree of support. Those who identify themselves as Reform are clearly least favourable toward gays in the classroom, but the weight of opinion among Reformers is clearly on the side of acceptance not rejection. Both Liberals and Conservatives are even more accepting of gay teachers, as are non-partisans. But those who identify with the NDP and the BQ really stand out, with virtually all of them standing in favour of the right of gays to teach in the schools.[44]

Table 4
Regional and Partisan Changes in Support for Gay Teachers (Percent approve)

	National	Atlantic	Quebec	Ontario	Prairies	BC
1987	51.2	36.2	59.6	52.5	46.3	46.8
N=	(2006)	(177)	(535)	(720)	(341)	(233)
1999	76.1	75.3	85.8	72.6	68.3	77.7
N=	(950)	(77)	(240)	(339)	(164)	(130)

	National	Liberal	Reform	PC	NDP	BQ	Other
1987	51.2	56.3	--	44.3	57.7	--	50.6
N=	(2006)	(625)		(424)	(300)		(656)
1999	76.1	76.9	57.6	71.8	92.1	95.6	75.2
N=	(950)	(360)	(92)	(117)	(76)	(68)	(237)

The three and four percent replying "don't know" and one percent refusals in 1987 and 1999 have been excluded from this table. Including them brings the national approval figures in line with Figure 5.

The overall thrust of these results is that most Canadians endorse the position taken by the Supreme Court of Canada in the *Vriend* case: homosexuals should receive the full protection of our basic human rights legislation. Moreover, as far as most Canadians are concerned, the time has come to accept gays as teachers and fellow citizens entitled to the same rights and freedoms as everyone else. This attitude is similarly evident in the public reaction to the recent *M. v. H.* ruling from the Supreme Court of Canada,[45] in which one anonymous lesbian sued another for support after a failed relationship. The Court ruled that the relevant Ontario law concerning support payments was unconstitutional because it confined the word spouse to heterosexual couples. Polling in the wake of the decision suggests that Canadians once again concur with the Court.[46] Of course, not everyone agrees, as evidenced by demonstrations in front of the Supreme Court of Canada protesting the *M. v. H.* ruling.[47] Still, the Court's ruling, far from being counter-majoritarian, seems to reflect well the view of most Canadians.

We find, then, a significant difference in public opinion toward Supreme Court rulings in the areas of legal rights and equality rights. Most Canadians disagree with the gist of the *Feeney* decision and other search and seizure rulings, while most agree with the essence of *Vriend*. Before examining how these attitudes relate to general opinion on the courts and the Charter, we first consider another type of case, the Quebec secession reference, which has elicited a more mixed response from the Canadian public.

Political Legitimacy: *Reference re Secession of Quebec*[48]

In August 1998, the Supreme Court of Canada handed down its ruling in the Quebec secession reference. The Court

had been asked by the federal government to rule on three questions: 1) whether Quebec could declare independence unilaterally under Canadian domestic law; 2) whether it could do so under international law; and 3) in case of conflict, which law was to take precedence? The Court ruled that Quebec could not legally secede unilaterally under either domestic or international law, rendering the third question immaterial.

But the ruling did not end there. The Court added some unexpected elements to its decision, going beyond the three specified questions to render a much broader judgment. One important added component that took most observers by surprise was the Court's pronouncement that the rest of Canada had an obligation to negotiate the terms of Quebec's departure following a clear referendum vote in favour of sovereignty.

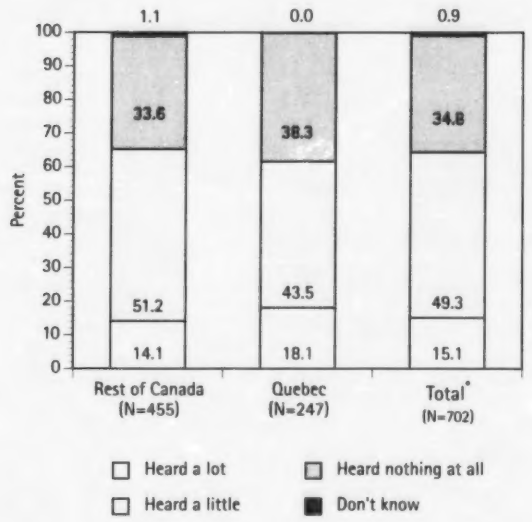
In its decision, the court took great care to point out that "[i]n our constitutional tradition, legality and legitimacy are linked."[49] Our constitution thus includes a number of principles and conventions. So while "[a] clear majority vote in Quebec on a clear question in favour of secession ... by however strong a majority, would have no legal effect on its own," it still remains that "the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada."[50] Accordingly, the Court found that "[t]he corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table."[51]

This complex ruling in the Quebec separation reference was prefigured in another of the Court's historic decisions, the patriation reference.[52] In that case too, the Court issued a double-edged ruling. The first element pertained to the letter of the law, the second to unwritten political convention. On one hand, the Court ruled (7-2) that the federal government was not legally required to obtain the consent of the provinces to patriate the constitution and proclaim a charter of rights. On the other, it ruled (6-3) that by constitutional convention the proper use of legal power required a substantial degree of provincial agreement. In short, as the Court later characterized its 1982 ruling, "the legitimacy as distinguished from the formal legality of the [1982] amendments derived from political decisions taken in Canada within a legal framework."

The ruling in the Quebec separation reference, widely seen as one the most important in the Court's history, generated much media coverage and seemed to attract considerable public attention. The results in Figure 6 confirm this impression.[53] Asked whether they had heard a lot, a little or nothing at all about "the ruling a few months ago on the legality of Quebec secession," 15 percent said they had heard a lot, while close to 50 percent had heard a little.[54] One-third reported they had heard nothing at all. Self-reported awareness of the secession reference was, then, relatively high — certainly compared to the *Vriend* decision, of which more than 60 percent of respondents said they had heard nothing at all.

The fact that the Quebec secession ruling more deeply penetrated the public consciousness than the *Vriend* decision, itself highly controversial and the subject of much media coverage, reinforces a point noted in an earlier paper: While current debate in Canada and elsewhere about judicial politics often revolves around the role of courts in applying bills of rights to nullify legislation, high courts also come under scrutiny from time to time for their adjudication of other types of disputes. This is particularly true in Canada, where the reference case procedure has twice placed the Supreme Court at the centre of Canada's national unity tempest. These controversial cases are highly salient in the public mindset and, for some Canadians anyway, likely overshadow debate about the role of Canada's courts in reviewing legislation or police actions to ensure conformance with the Charter of Rights. The Court's involvement on

Figure 6
Awareness of Ruling on Quebec Secession



* In order to derive totals for the figures reported in this section, the Quebec and ROC values were weighted in accordance with population proportions (roughly 25 percent to 75 percent).

national unity questions has received greater public attention, and thus public attitudes toward the issues involved may be more closely linked to diffuse support for Canada's judicial institutions, an issue we will take up below.

Respondents were next asked whether they agreed with each element of the Court's decision: the legality of unilateral secession and the rest of Canada's obligation to negotiate. The overall division of opinion is quite predictable. Quebecers are ambivalent about the first part of the Court's ruling and highly supportive of the second, while other Canadians strongly endorse the first part and are less sure about the second.

Figure 7 reports attitudes toward the Court's ruling on the legality of unilateral secession. The question to respondents read as follows: *As part of its decision, the Court ruled that Quebec did not have the legal right to secede from Canada unilaterally. Thinking about this part of the decision, would you say that you agree or disagree?* The table shows that there is solid support outside Quebec for this part of the decision, with nearly three-quarters of respondents in agreement. Opinion on the matter is consistent across partisan divisions, with support falling between 76 percent and 78 percent for each of Liberal, Tory, Reform and NDP supporters. Those without a party preference, at 68 percent, bring the overall figure down slightly.

In Quebec, by contrast, the Court's ruling on unilateral secession is divisive and strongly related to partisan affiliation. Overall, 41 percent of Quebecers agree with the Court, while 52 percent disagree. Among Bloc Québécois supporters, however, only 11 percent agree, while 84 percent disagree and four percent are undecided (N = 70). Among all others, including non-partisans, 52 percent agree, 39 percent disagree and nine percent are undecided (N = 174).

Figure 8 reports attitudes toward the second main component of the Court's decision. Respondents were read the following question: *In another part of its decision, the Court ruled that the rest of Canada had an obligation to negotiate with Quebec after a clear referendum vote for sovereignty. Do you agree or disagree with this part of the decision?*[55] Opinion on this matter is somewhat divided outside Quebec, with 55 percent agreeing with the Court and 40 percent disagreeing. In Quebec, the Court's decision is more uniformly endorsed, with 70 percent backing the ruling. Thus, opinion on the obligation to negotiate is, in some measure, the mirror image of opinion on the right to secede — though significantly there is, in this instance, majority agreement with the Court both inside and outside Quebec.

If support in the rest of Canada for the obligation to negotiate is lower than support for the declared illegality of unilateral secession, it is also less uniform across partisan divisions. Support in the rest of Canada for the obligation to negotiate ranges between 57 percent and 64 percent among backers of the older parties (the Liberals, Tories and NDP), but sits at only 38 percent among Reformers (N = 55). Similarly, a question gauging

Figure 7
Opinion on Quebec's Right to Secede

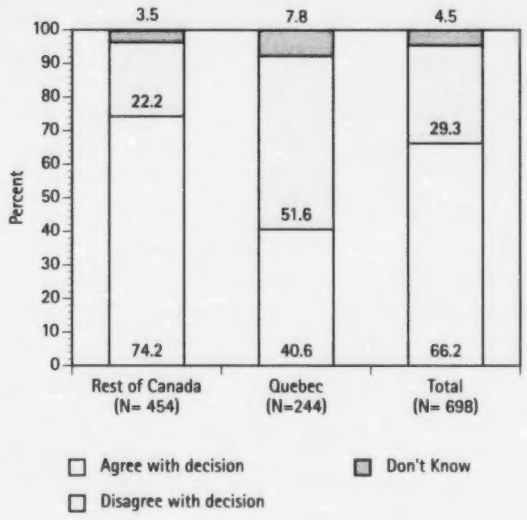
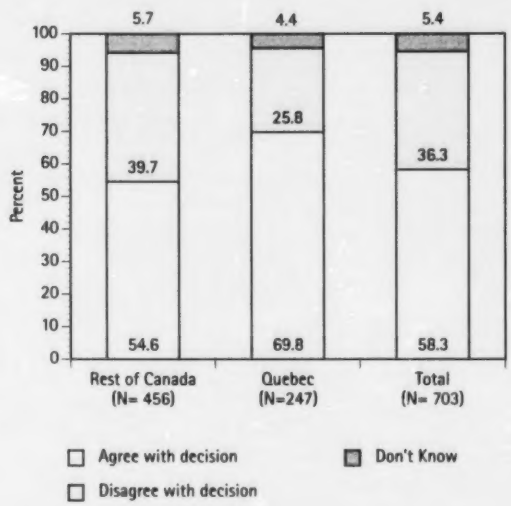


Figure 8
Opinion on Rest of Canada's Obligation to Negotiate



respondents' feelings toward the French language — How important is preserving French and English as the two official languages of Canada? — is also correlated with attitudes toward the obligation to negotiate. Among those who think it's very or somewhat important to maintain the two official languages, about 60 percent support the obligation to negotiate ruling. Among those who say it's not important, this drops to 41 percent. The same question, however, shows no relationship among non-Quebec respondents with attitudes on the right to secede ruling.

In Quebec, the order of things is reversed: Opinion on the obligation to negotiate is less divided on partisan lines than is opinion on the right to secede. Among Bloc supporters 79 percent agree there is an obligation to negotiate, but so too do 67 percent of all others. Quebecers may differ over whether Quebec has a legal right to secede unilaterally, but they are in agreement over the rest of Canada's obligation to negotiate with Quebec after a successful referendum.

Attitudes toward each part of the Supreme Court ruling considered in isolation tell us something about the level of support for the decision, but perhaps more telling are the results of the two questions considered in combination, as shown in Table 5. The table confirms the substantial, though far from overwhelming, public support for the secession ruling. In both Quebec and the rest of Canada, only a small minority reject both aspects of the Court's ruling. Naturally, there is a solid minority in both places that agrees with only the part of the decision favourable to "their side" — 32 percent in ROC agree with only the illegality of unilateral secession; 39 percent in Quebec agree with only the obligation to negotiate. But a clear plurality in ROC (43 percent) and a very substantial minority (32 percent) in Quebec agree with both parts of the decision. Only small percentages in both places concur with only that aspect of the ruling favourable to the other group.

Also relevant to the structure of public opinion on the secession reference are levels of awareness of the case. It will be recalled that awareness of the *Vriend* decision — whether the respondent had heard a lot, a little, or nothing at all about the rul-

Table 5
Combined Opinions on Quebec Secession Decision

	Rest of Canada	Quebec	Total
Agree with neither*	13.1	18.6	14.3
Agree secession illegal only	31.6	9.7	26.4
Agree with obligation to negotiate only	11.8	39.4	18.4
Agree with both	43.4	32.2	41.0
(N)	(449)	(236)	(685)

*Includes respondents disagreeing with both parts of the decision, or disagreeing with one part of decision and responding "don't know" to the other; excludes those who responded "don't know" to both questions.

ing — had no bearing on attitudes toward the decision. The same is not true for the secession reference. Consider the figures shown in Table 6, which reports opinion on the decision broken down by awareness level. In ROC, those relatively aware of the Court ruling — those who had heard a lot or little about it — are considerably more supportive. Indeed, among this group, there is majority support for both parts of the ruling, compared to just over one-quarter support among those who have heard nothing at all about it. A similar pattern is apparent in Quebec. Those who have heard a lot or a little about the decision are somewhat more likely to agree with both parts of the decision, and considerably less likely to reject both.

The following table suggests why knowledge makes a difference to respondents' attitudes: awareness of one part of the ruling seems to have some impact on opinion about the other part. This, at least, is the inference that can be tentatively drawn from a question ordering experiment embedded in the telephone survey, wherein half of the respondents were asked first about the Court's decision on Quebec's right to secede and the other half were asked first about the rest of Canada's obligation to negotiate.

Table 7, Panel A shows attitudes in the rest of Canada on the obligation to negotiate as a function of question placement. When respondents are asked this question first, 54 percent agree with the Court's ruling. However, when this question is put to respondents second — when respondents, in other words, are first informed (or reminded) that the Court decided Quebec could not secede unilaterally — support rises to 62 percent.[56] This difference suggests that introducing the positive element first (from ROC's point of view, the illegality of unilateral secession) seems to soften up respondents and render them more amenable to the less palatable part of the ruling.

Attitudes in Quebec on the right to secede show a similar pliability. As Panel B of Table 7 shows, when Quebecers are asked about this element of the ruling first, 41 percent agree. But when respondents are first informed about the ruling on the obligation to negotiate, the level of agreement rises to 48 percent. While the difference in this case is not statistically significant, due to the smaller sample size in Quebec, it is of a similar magnitude to the question order effect in ROC.[57] Quebecers, we can tentatively conclude, are more likely to accept that their province cannot secede unilaterally when first apprised of the mollifying proviso that the rest of Canada must negotiate.

Opinion on the Quebec secession reference is then nuanced and uneven, varying between Quebec and the rest of Canada and across respondents with different awareness levels. In the aggregate, it is also relatively neutral, unlike attitudes toward the other rulings discussed above. While there is

Table 6
Awareness and Attitudes on Quebec Secession Decision

	Heard lot or little about decision	Heard nothing at all or don't know
Rest of Canada		
Agree with neither*	10.9	17.6
Agree secession illegal only	27.6	39.2
Agree with obligation to negotiate only	9.9	15.0
Agree with both	51.7	28.1
(N)	(294)	(153)
Quebec		
Agree with neither*	12.7	29.1
Agree secession illegal only	10.0	9.3
Agree with obligation to negotiate only	41.3	36.0
Agree with both	36.0	25.6
(N)	(150)	(86)

* Includes respondents disagreeing with both parts of the decision, or disagreeing with one part of decision and responding "don't know" to the other; excludes those who responded "don't know" to both questions.

Table 7
Order Effects on the Elements of the Quebec Secession Reference

Panel A: Rest of Canada, Question Order Effect on The Obligation to Negotiate

	Obligation to negotiate asked first	Obligation to negotiate asked second
Agree	53.6	62.3
Disagree	46.4	37.7
(N)	(211)	(220)

Panel B: Quebec, Question Order Effect on The Right to Secede Unilaterally

	Right to secede asked first	Right to secede asked second
Agree	40.9	47.7
Disagree	59.1	52.3
(N)	(115)	(111)

overwhelming public agreement with the *Vriend* decision enforcing equal employment rights for homosexuals, and generally strong opposition to court rulings upholding civil liberties such as the freedom from unreasonable search and seizure, the state of public opinion on the secession reference is more evenly split.

But as we will see below these negative, positive and more neutral attitudes toward specific cases do not have equal impact on public sentiment toward the courts more generally. Instead, some exert more influence than others. Furthermore, the influence of specific cases on general sentiment varies across different measures of court support. The next sections examine these linkages and assess their implications for both the future evolution of Canadian attitudes toward the courts and the possible directions for further public opinion research in the area of judicial politics.

Feeney, Vriend, Secession of Quebec and Support for the Court and the Charter

How do opinions on the cases we have examined relate to more general sentiments about Canada's courts and the Charter? Our survey had several relevant items that allow us to tap into diffuse support for Canada's judicial institutions. Opinions on the Charter were measured by a question that asked respondents whether they thought the Charter of Rights is a good thing or a bad thing for Canada. To gauge general support for Canada's courts, numerous items were included on the questionnaire. One was taken from the 1987 Charter Project study and asked respondents: *When the legislature passes a law, but the courts say it is unconstitutional on the grounds that it conflicts with the Charter of Rights, who should have the final say, the legislature or the courts?* Four others, asking about Canada's Supreme Court, were taken from the series of cross-national surveys conducted in the past several years by Gibson, Caldeira and Baird.[58] Respondents were first asked if they were *satisfied with the way the Supreme Court has been working.*[59] They were also asked if they agreed with the following three statements: 1) *The Supreme Court can usually be trusted to make decisions that are right for the country as a whole*; 2) *The right of the Supreme Court to decide certain controversial issues should be reduced*; and 3) *If the Supreme Court started making a lot of decisions that most people disagreed with, it might be better to do away with the Supreme Court altogether.*

Table 8 summarizes the relationship between the six different measures of Charter and court support and opinion on three cases — *Feeney*, *Vriend* and the Quebec secession reference — by showing the percentage supporting the Court broken down by respondent opinion on the three cases.

Scanning the overall results reveals one immediate and important difference: of the three cases, it is clear that opinions on the *Feeney* ruling are not strongly linked to general assessments of the Charter or Canada's courts. None of the differences observed between supporters and opponents of the *Feeney* ruling is large or achieves statistical significance. The same is not true of *Vriend* and the Quebec secession reference; attitudes toward these decisions show stronger linkages to diffuse support for Canada's judicial institutions. For example, in the case of satisfaction with the Supreme Court, there is a significant linkage with both of the latter cases. The secession ruling has the larger effect of the two, with a satisfaction gap of 20 points between those in agreement with both parts of the decision (86 percent) and those in agreement with neither (66 percent).[60] In the case of *Vriend*, the gap is slightly smaller, with supporters of the decision showing a satisfaction level of 81 percent compared to 66 percent among opponents of the ruling. For *Feeney*, the difference on this item is insignificant. It would seem then that opinions on this controversial case,

where most people disagree with the judicial ruling, have relatively little impact on diffuse support for the courts, whereas the decisions enjoying greater public support have more influence.

It would also seem to be true that the case involving civil liberties (*Feeney*) is less closely linked in the public mindset to the Charter and the practice of judicial review than the case involving equality rights (*Vriend*). This finding is in keeping with previous analyses which have found equality rights in the Charter to be especially salient to the general Canadian public[61] — this despite the fact that at the Supreme Court level there have been more Charter challenges involving legal rights in the 1990s and these have enjoyed higher rates of success.[62]

It is interesting to note, however, that the type of considerations invoked by *Feeney* — the relative importance of civil liberties and efficacious law enforcement — are significant for some. For Reform Party supporters, in particular, opinions on the *Feeney* case have a strong impact on diffuse support for judicial institutions. This relatively small group in our survey sample, mostly opposed to the *Feeney* ruling, are also on most measures considerably less supportive of the courts and the Charter. Among those for whom a particular issue is salient, the linkage between specific cases and more general support can be quite strong. But the number of Reformers in the sample is relatively small and their atypical attitudes do not therefore affect the overall result. In the population at large, it is *Vriend* and the secession reference that are more closely linked to Charter evaluations and court support.

The impact of issue salience on attitudes is also evident when the *Vriend* results shown in Table 8 are broken down by awareness level. Among those who have heard a lot or little about the ruling, the linkage between feelings about the case and diffuse Court support is considerably stronger than it is among those who have heard nothing of the case. For example, while Table 8 shows a 12 percent gap in court support (on the final say item) between opponents and supporters of the *Vriend* ruling, further analysis reveals an 18 percent gap among those with some awareness of the decision and only a nine percent gap among those unaware. Similarly, the 13 point gap in Charter support is a more impressive 22 percent in the aware group and only six percent in the unaware. The expected connections between specific cases and general attitudes are present in our survey sample and are, in some sub-groups, of considerable magnitude. But in the population at large, these connections are attenuated by the weakness of attitudinal linkages among Canadians with low awareness levels about judicial decisions, coupled with relatively high levels of unawareness.

In sum, Court decisions that Canadians oppose in the area of civil liberties seem to have less impact on general attitudes toward Canada's judicial institutions than do rulings in other areas that are more favourably received. Moreover, awareness of specific cases can be an important mediating factor, for the connection between specific and diffuse support is often stronger among those with some awareness of a given ruling

Measures of Court Support

The data in Table 8, in addition to offering insight into the relative salience and importance of specific cases to diffuse support for Canada's judicial institutions, also shed light on the different measures of court support. Revealing in this respect are certain contrasts in the general pattern of linkages apparent in the *Vriend* case and the secession reference. One noteworthy difference is the relationship between these cases and the question of Final Say, which seeks respondents' opinions on the practice of judicial review, referring explicitly to courts striking down legislation held to be in conflict with the Charter of Rights. As would be expected, opinion on this question is related to attitudes toward the *Vriend* decision. Those opposed to the *Vriend* ruling are less likely than those sup-

Table 8
Percentage Support for the Charter and Courts by Opinion on Three Supreme Court Cases

Response	Feeney Decision		Vriend Decision		Quebec Secession Reference		
	Agree	Disagree or don't know	Agree	Disagree or don't know	Agree with both parts	Agree with one part	Agree with neither part
Charter	81.6	81.6	84.8*	72.0	84.1	79.0	83.6
(N=)	(152)	(354)	(388)	(118)	(251)	(271)	(73)
Final Say	60.7	65.0	66.4*	54.2	64.1	61.8	68.0
(N=)	(174)	(403)	(436)	(138)	(281)	(304)	(97)
Satisfaction	76.7	76.6	80.6*	66.0	86.3**	72.9	65.9
Trust	77.0	70.7	77.1*	60.9	74.2	69.7	70.4
Reduce	48.0	40.4	45.7*	34.0	48.4	41.1	37.0
Do Away	53.1	52.3	53.0	52.1	58.4**	57.0**	42.0
(N=)	(174)	(403)	(436)	(138)	(256)	(270)	(81)

* Significantly different from "disagree or don't know" ($p. < .05$).

** Significantly different from "agree with neither part" ($p. < .05$).

Charter: Charter a good thing (excludes those who have not heard of Charter)
Final Say: Courts should have final say not legislature
Satisfaction: Satisfied with the way the Supreme Court has been working
Trust: Agree that the Supreme Court can usually be trusted to make decisions that are right for the country as a whole
Reduce: Disagree that right of the Supreme Court to decide certain controversial issues should be reduced
Do Away: Disagree that if Supreme Court started to make a lot of decisions most people disagreed with it might be better to do away with it altogether.

portive of the ruling to think the courts should have the final say, with a gap of 12 percent between the two groups (54 percent vs. 66 percent). No similar effect, however, is apparent for the secession reference. Among those agreeing with both parts of the ruling, 64 percent choose the courts; among those concurring with one part of the decision, 62 percent prefer the courts; and among those rejecting both elements of the decision, 68 percent opt for the courts. Opinion on the Quebec secession decision, unlike *Vriend*, does not seem to be related to respondents' assessments of the courts' authority to strike down unconstitutional legislation. For the Charter question, a similar pattern obtains. Opinions on *Vriend* are linked to Charter assessments, whereas opinions on the secession reference are not.

These are, of course, perfectly sensible results, since the Quebec secession ruling was a reference case that did not involve Charter review. What is notable is the fact that despite the absence of a Charter connection in this case and the apparent success of respondents in recognizing this, there remains a relationship of considerable strength between attitudes toward the secession case and feelings about Canada's Supreme Court (items Satisfaction and Do Away, and to a lesser degree Reduce). Clearly there are other considerations at work affecting people's attitudes toward Canada's highest court — in particular, we might surmise, its position as a branch of the federal government and its role in adjudicating disputes concerning federal-provincial authority and national unity.

It appears then that our previous conclusion concerning the complex nature of Supreme Court assessments is corroborated. Attitudes toward the practice of judicial review are certainly relevant to

evaluations of the courts, but when the object of study is a country's highest court, other factors also have an impact. General sentiments about the central government and its connections to the high court will tend to condition public opinion. This certainly seems to be the case in Canada, and likely holds true of other countries experiencing similar conflicts and disagreements over central governmental authority.

Also noteworthy in the general pattern of results is that opinion on the *Vriend* decision has no impact on Do Away, whereas opinion on the Quebec secession reference has a sizable effect on this measure of Court support. In our previous paper, it was suggested that of the various questions included in the cross-national surveys, it is Do Away that appears on the face of it to be the best measure of deep institutional mistrust, since it asks whether respondents would contemplate doing away with their highest court altogether. If this thought is correct, the linkage with the specific cases seems a sensible result, for critics who assail *Feeney* or *Vriend*-type decisions rarely contend that the Supreme Court should be done away with altogether. Instead, they hearken to pre-Charter days when the role of Canada's courts was more modest, and contentious social and political issues were either decided by legislatures or left unregulated. They call for judicial restraint, not abolition of the Supreme Court. Critics who denounce the Supreme Court as a partisan instrument of federal power, on the other hand, are more inclined to go the extra mile and call for its complete abolition along with other federal institutions of governance. That negative evaluations of the secession ruling are linked to attitudes about doing away with the Court altogether suggests the latter measure does indeed represent the deepest taproot of institutional support.

The analysis undertaken here points to a general method of advancing knowledge about public opinion on the courts. There is something to be learned from probing attitudes toward specific cases and linking these to different measures of diffuse support. Such an approach can be seen as an iterative method of analysis: on the one hand, knowing which types of cases affect particular measures of diffuse support tells us something about the measures and what they tap into; on the other hand, knowing which measures of support are correlated with opinion on specific cases tells us something about the cases and the types of considerations they evoke in the population. Our analysis of these high profile Canadian cases suggests there can be considerable variation in the relationship between specific cases and measures of diffuse support.

The Cases in Combination

Our analysis to this point has examined a variety of court cases largely in isolation from one another, addressing two basic questions: what is the level of public support for case X and how does this relate to more general attitudes toward Canada's courts? There is, however, something to be gained from analyzing respondents' combined attitudes toward these cases to see how various combinations interact and condition general attitudes.

Slightly over 10 percent of the population is opposed to all three of the prominent Court rulings we asked about on our survey.[63] At the same time, an equal percentage is supportive of all three decisions. This means, of course, that the largest group — fully three-quarters of respondents — is of mixed opinion, finding only some Supreme Court decisions to their liking. As others have previously noted, public opinion on Court rulings seems to comprise a large band of ambivalent opinion, bracketed by opposing minorities more firm and consistent in their views.[64]

How do the three groups measure up in their general attitudes toward the courts and the Charter? Since we know opinions on the three cases – in particular *Vriend* and the Quebec secession reference — have some impact on general attitudes,

clearly some differences are to be expected. The relevant comparisons are summarized in Table 9.

Some of the differences apparent in the figures in Table 9 are considerable. On two measures — satisfaction with the Supreme Court and a desire to see the Supreme Court's right to decide controversial issues reduced — the gap between consistent supporters of Court rulings and consistent opponents approaches 30 percent. On other measures — Charter support and trust in the Court to make decisions right for the country as a whole – the gap is on the order of 20 percent. These figures exceed by a fair margin the differences previously seen for the individual cases (see Table 8). The cumulative effect of consistent disagreement with Court rulings is markedly greater than the impact of single decisions in isolation.

Yet this cumulative impact should not be overstated. Consistent opponents of Court decisions may be less supportive of Canada's judicial institutions than those happy with recent rulings, but they are hardly inveterate foes. Most pick the courts over the legislature when asked who should have the final say in cases of a Charter conflict (58 percent pick the courts, 35 percent the legislature, and seven percent do not know). Half would not countenance dispensing with the Court altogether (Do Away) even if it were consistently to make a lot of decisions with which most people disagreed; only 29 percent would, while 16 percent are undecided. Three-quarters, moreover, regard the Charter as a good thing (Charter). On only one measure, Reduce, is there even plurality support for an anti-Court sentiment: 47 percent would like to see the right of the Supreme Court to decide controversial issues reduced, compared to 28 percent who would not and 25 percent who are undecided. Thus, aversion to Supreme Court rulings does have a considerable impact on attitudes toward the institution more generally, but there remains a large reservoir of support even among the small portion of respondents consistently opposed to recent high-profile decisions.

Broadly speaking, then, public opinion toward specific decisions of Canada's courts is fairly symmetrical, with a broad band of mixed opinion at its centre, and small minorities on either side who differ considerably in their feelings about specific rulings from the Court. As to diffuse support for the courts and the Charter, both remain high. The spectrum of diffuse support is thus not centred on the mid-point, it is shifted decisively toward the positive end of the scale. Even consistent opponents of Supreme Court rulings are modestly favourable in their assessments of Canada's judicial institutions, while those more positive about the Court's recent work are stalwart supporters.

Conclusion

Our principal objective in this paper was to explain why Canadians continue to hold the Charter and the courts, including the Supreme Court, in high regard by examining some contentious cases that have made waves in legal and political circles. The analysis points to several conclusions:

- The level of public support for specific Supreme Court rulings varies considerably from case to case. In cases involving civil and legal rights, such as *Feeney* and *Therens*, Canadian opinion largely runs counter to judicial determinations. However, in the prominent *Vriend* case, involving equality rights for homosexuals, public opinion is highly supportive of the Court's ruling (protestations from its Alberta opponents notwithstanding[65]). Meanwhile, attitudes toward the Court's ruling in the secession reference are mixed. Support in Quebec is probably higher than would have been expected before the ruling came down, but nevertheless lower than in the rest of the country

Table 9
Percentage Support for the Charter and Courts by Combined Opinion on Three Cases

Response	Agree with all three (%)	Mixed opinion (%)	Disagree with all three (%)
Charter	92.1*	82.1	74.6
(N=)	(63)	(368)	(59)
Final say	62.9	65.1	57.7
Satisfaction	88.6*	77.8*	60.8
Trust	81.2*	74.6*	59.7
Reduce	55.7*	42.8*	27.8
Do away	62.3	51.5	50.0
N=	(70)	(429)	(73)

* Significantly different from the third column ($p < .05$).

Charter: Charter a good thing (excludes those who have not heard of Charter)
Final Say: Courts should have final say not legislature
Satisfaction: Satisfied with the way the Supreme Court has been working
Trust: Agree that the Supreme Court can usually be trusted to make decisions that are right for the country as a whole
Reduce: Disagree that right of the Supreme Court to decide certain controversial issues should be reduced
Do Away: Disagree that if Supreme Court started to make a lot of decisions most people disagreed with it might be better to do away with it altogether

where a majority supports both principal parts of the decision.

- Awareness of Supreme Court rulings is on the whole quite low, though this too varies from case to case. Only seven percent of Canadians have heard a lot about the *Vriend* decision and another 30 percent have heard a little, leaving over 60 percent who say they have heard nothing at all. Awareness of the secession reference is considerably higher, however, with two-thirds having heard something of the case and about a third of Canadians reporting they have heard nothing at all.
- Awareness can, but need not, have an impact on attitudes toward judicial decisions. In the secession reference, those with higher levels of awareness of what many commentators considered a finely balanced decision tend to think more highly of it. In the *Vriend* case, however, no such linkage is apparent: levels of support for the decision are constant across awareness levels.
- The linkage between opinions on particular cases and diffuse support for the courts and Charter varies considerably. In the case of *Feeney*, for example, these connections are weak, whereas for *Vriend* and the secession reference, they are considerably stronger. This helps explain continued high levels of support for the Charter and Canada's courts: the judicial decisions of which Canadians approve have greater leverage over their general feelings toward the Charter and courts than do those they oppose.
- The differential impact of various cases may be linked to awareness levels. Our data show, for example, that awareness of the *Vriend* decision makes a considerable difference to the strength of the connection

between case opinion and more general feelings toward the courts and Charter: these linkages are stronger among those who know something of the decision. Similarly, among Reform partisans, for whom law and order issues are especially salient, attitudes toward the *Feeney* ruling are correlated with diffuse support. But their small numbers mean that this connection is much attenuated in the sample as a whole.

- There is reason to think the survey questions commonly used to gauge diffuse support for the courts differ in subtle but important ways. In particular, those referring to a country's high court may, in federal states, invoke considerations related to the court's role in adjudicating disputes of a federal-provincial nature.
- Combined attitudes toward the three cases offer insight into the overall configuration of public opinion toward the courts. Only a small minority opposes all three decisions, and only a small minority supports all three; most people are of mixed opinion. The impact of these aggregate opinions on diffuse support is marked. Consistent opponents and consistent supporters of Court rulings are far apart on some measures of general court and Charter support. Thus, opinions about the Court's work do bear upon perceptions of its deeper institutional legitimacy. But at the same time, there remains a considerable reservoir of diffuse support even among consistent opponents of Supreme Court rulings.

These findings shed considerable light on the question posed at the outset: Why do Canadians continue to hold their courts and the Charter in high regard despite mounting criticism from academics and pundits alike? The answer, it turns out, is complex. In part, it is simply that Canadians approve of seemingly controversial decisions rendered by the courts, *Vriend* being a case in point. In part, low awareness levels attenuate the connection between opinion on specific cases and more general attitudes. And in part, there is an asymmetry in the impact of negatively and positively received cases on more general attitudes, which may well be linked to variations in case awareness.[66]

All of this speaks to the current state of affairs, of course, and the future could look quite different. If our analysis suggests that recent controversial decisions have not significantly dented public confidence in the Charter and the courts, it also indicates that public opinion on Court rulings can affect more general attitudes. The continued legitimacy of our judicial institutions, if not in imminent danger, cannot be taken for granted and will depend, in part, on the particulars of the cases that enter the Court's docket and penetrate public consciousness in the months and years to come. That said, however, significant erosion seems unlikely. Despite a barrage of criticism recently directed at certain prominent judicial rulings, support for the courts and Charter is holding firm.

1 See previous paper is this issue of *Choices*.

2 Critical academic commentary can be found in Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989); Rainer Knopff and F.L. Morton, *Charter Politics* (Scarborough, Ont.: Nelson Canada, 1992); and F.L. Morton, "The Charter of Rights: Myth and Reality," in William D. Gairdner (ed.), *After Liberalism: Essays in Search of Freedom, Virtue and Order* (Toronto: Stoddardt, 1998). See also the papers by F.L. Morton, Rainer Knopff, E. Preston Manning and Sébastien Lebel-Grenier in *Policy Options*, Vol. 20, no. 3 (April 1999). In the popular press, see Preston Manning, "Parliament, Not Judges, Must Make the Laws of the Land," *The Globe and Mail*, June 16, 1998, p. A23; Filip Palda, "Nine Despots are the Best We Can Do," *National Post*, July 14, 1999, p. A18; and Ian Hunter, "Taking the Law in Vain," *National Post*, July 29, 1999, p. A19. In response to these criticisms, Canada's Supreme Court justices have begun defending themselves publicly, as in Janice Tibbetts, "Politicians duck divisive issues, chief justice says," *National Post*, July 12, 1999, p. A1.

3 Paul M. Sniderman, Joseph F. Fletcher, Peter H. Russell and Philip E. Tetlock, *The Clash of Rights: Liberty, Equality and Legitimacy in Pluralist Democracy* (New Haven: Yale University Press, 1996), p. 252. See also Jeffrey J. Mondak and Shannon Ishiyama Smithey, "The Dynamics of Public Support for the Supreme Court," *Journal of Politics*, Vol. 59, no. 4 (November 1997), pp. 1114-42.

4 This theoretical approach was pioneered by David Easton in *A Systems Analysis of Political Life* (New York: John Wiley and Sons, 1965). See also David Easton, "A Re-Assessment of the Concept of Political Support," *British Journal of Political Science*, Vol. 5 (October 1975), pp. 435-57.

5 A more comprehensive overview of the American literature on Supreme Court support can be found in Lori Hausegger and Troy Riddell, "The Changing Nature of Public Support for the Supreme Court of Canada," paper presented at the 1998 Annual Meeting of the Canadian Political Science Association, Ottawa, May 31-June 2, 1998, pp. 2-5.

6 Walter F. Murphy and Joseph Tanenhaus, "Public Opinion and the United States Supreme Court," *Law and Society Review*, Vol. 2, no. 3 (May 1968), pp. 357-84.

7 Gregory A. Caldeira and James L. Gibson, "The Etiology of Public Support for the Supreme Court," *American Journal of Political Science*, Vol. 36, no. 3 (August 1992), p. 638.

8 Caldeira and Gibson, "The Etiology of Public Support for the Supreme Court," p. 636.

9 Caldeira and Gibson ask respondents whether the Court is too liberal or too conservative or about right in its decisions, counting the final category as specific support. See Caldeira and Gibson, "The Etiology of Public Support for the Supreme Court," p. 642.

10 This item asks respondents how satisfied they are with how the high court of their country has been working. See James L. Gibson, Gregory A. Caldeira and Vanessa A. Baird, "On the Legitimacy of National High Courts," *American Political Science Review*, Vol. 92, no. 2 (June 1998), pp. 343-58, esp. Tables 7 and 8.

11 Gibson, Caldeira and Baird, "On the Legitimacy of National High Courts," p. 356.

12 The questionnaire was developed by Paul Howe and Joseph Fletcher. The fieldwork was carried out between March 1 and March 20, 1999, by Opinion Search, an Ottawa-based polling firm. The sample size of 1,005 produces results accurate to within ± 3.1 percent, 19 times out of 20. Potential respondents were called up to 10 times to try to secure an interview. The response rate of 30 percent is typical for Canadian commercial surveys.

13 Sniderman *et al.*, *The Clash of Rights*.

14 Gibson, Caldeira and Baird, "On the Legitimacy of National High Courts."

15 *R. v. Feeney* [1997] 2 S.C.R. 13. The rulings are also available through the Supreme Court of Canada Website at: www.scc-csc.gc.ca

16 *R. v. Feeney* at p. 35.

17 *R. v. Feeney* at p. 17.

18 *R. v. Therens* [1985] 1 S.C.R. 640.

19 In 1987, half of the respondents were randomly selected to hear a slightly different version of the question, which said that the driver "might have consulted a lawyer" to see whether explicitly framing the matter as one of right in any way affected responses. We found no significant difference then, so we decided this time to ask only the "had a right" version of the question.

20 Questions replicating items from the 1987 study were asked of all respondents in the present survey. For reasons of economy, questions with no 1987 comparison were posed to a randomly selected 60 percent of the respondents in the 1999 study. Thus the number of respondents for these items is 600.

21 It is perhaps worthwhile to note, since it is rarely mentioned in criticisms of the ruling, that despite the exclusion of the evidence Feeney was convicted at retrial.

22 Some of the dissenting judges in both *Therens* and *Feeney* have suggested that *not* allowing the evidence into court may bring the administration of justice into disrepute. This provides the basis for a question reported here on this point.

23 Technically, the difference between the 1987 and 1999 results does not quite reach conventional levels of statistical significance with this number of cases. So the opening sentence of the paragraph is perhaps the best way to characterize these results.

24 *R. v. Collins* (1987), 33 C.C.C. (3d) 207.

25 *Vriend v. Alberta* [1998] 1 S.C.R. 493.

26 *Egan v. Canada* [1995] 2 S.C.R. 513.

27 *Vriend v. Alberta* [1996] 181 A.R. 16 at p. 28.

28 *Vriend v. Alberta* [1998] at p. 552.

29 Joe Woodard, "Ralph Gets Moral, and Alberta Gets Gay Rights: How Klein Snookered Public Opinion to Satisfy Homosexuals, the Supreme Court and the Media," *Alberta Report*, April 20, 1998, p. 12.

30 Woodard, "Ralph Gets Moral, and Alberta Gets Gay Rights."

31 Woodard, "Ralph Gets Moral, and Alberta Gets Gay Rights."

32 These results correspond to those of a September 1998 Angus Reid poll showing 80 percent of Canadians believe that gays should be protected against discrimination.

33 These Prairie results square with an April 1998 Angus Reid poll that found 64 percent of Albertans agreed when asked: "Do you, yourself, agree or disagree that human rights legislation in Canada should protect gays and lesbians from discrimination based on sexual orientation?" Kevin Steel, "The Poll that Wasn't," *Alberta Report*, May 25, 1998, p. 9.

34 It is worth noting that in its submission to the Court the province of Alberta never stated what societal objectives it intended to advance by denying equal rights protection based on sexual orientation.

35 Glenn Firebaugh, *Analyzing Repeated Surveys* (Thousand Oaks, Calif.: Sage, 1997).

36 Firebaugh, *Analyzing Repeated Surveys*, pp. 23-26.

37 Another approach via algebraic decomposition also suggests that the increase in support for gay teachers is preponderantly due to individual change. See Firebaugh, *Analyzing Repeated Surveys*, pp. 27-29.

38 See Firebaugh, *Analyzing Repeated Surveys*, pp. 29-32.

39 This squares with the recent American findings reported in Alan S. Yang, *From Wrongs to Rights: Public Opinion on Gay and Lesbian Americans Moves Toward Equality* (Washington, DC: National Gay and Lesbian Task Force, 1998).

40 In 1987 the gap between those with a high school education or less and those with a university education was 25.5 percent. Today it is 19.5 percent. Yang shows a similar narrowing in the US.

41 Yang also reports a stable gender gap over time.

42 All the differences shown easily exceed standard levels of statistical significance.

43 Although the individual provincial samples are small, it should be noted that even in Alberta where the controversy over the *Vriend* case was most acute, two-thirds of the respondents support gay school teachers.

44 Because of the emergence of new parties, it is difficult to consider the case for increasing partisan polarization like that made by Yang for the US. He shows that opinions have stagnated among those conservative in ideology or Republican by identification. In Canada, the change in Progressive Conservative views is substantial though one might argue that it is overstated given that some number of 1999 Reform Party supporters are drawn from 1987 Conservatives. But if this were the case, by the same token, one would have to argue that the difference between the 1999 Reform figure and the 1987 Conservative figure is understated.

45 [1999] 2 S.C.R. 3. The ruling is available through: www.scc-csc.gc.ca

46 Although the case did not hinge on the recognition of marriage of same sex couples, an Angus Reid poll conducted in the wake of the decision found that 53 percent of Canadians believe that homosexual couples should qualify for the legal recognition of marriage. Anne McIlroy, "Most in Poll Want Gay Marriage Legalized," *The Globe and Mail*, June 10, 1999, p. A1.

47 Leanne Yohemas-Hayes and Tu Thanh Ha, "Anti-gay Zealots from US Burn Flag," *The Globe and Mail*, August 3, 1999, p. A2. Most of the reports took particular note that the protesters were American.

48 *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

49 *Reference re Secession of Quebec* at p. 240.

50 *Reference re Secession of Quebec* at p. 293.

51 *Reference re Secession of Quebec* at p. 266.

52 *Reference re Resolution to amend the Constitution* [1981] 1 S.C.R. 753.

53 Insofar as we anticipated that there may well be differences on these items between respondents in Quebec and the rest of Canada (ROC) we made sure that these questions were posed not only to the random 60 percent of our sample but also to all respondents in Quebec. The sample size for these items is therefore 705 composed of 247 Quebecers and 458 from the rest of Canada.

54 The exact wording of the question was: *The Supreme Court issued a ruling a few months ago on the legality of Quebec secession. Have you heard a lot, a little, or nothing at all about this ruling?*

55 This question, of course, simplifies the Court's ruling. Rather than mentioning the "clear majority" and "clear question" conditions specified by the Court, it uses the more ambiguous phrase "a clear referendum vote for sovereignty." Nevertheless, it was felt to be a reasonable approximation of the Court's decision.

56 The Phi value for the ROC data is 0.09, which is marginally significant ($p = .07$).

57 The Phi value for the Quebec data is 0.07 ($p = 0.30$).

58 Gibson, Caldeira and Baird, "On the Legitimacy of National High Courts."

59 We treat this question as a measure of diffuse support, though other researchers treat it as a measure of specific support (see Gibson, Caldeira and Baird, "On the Legitimacy of National High Courts"). As discussed near the start, their thinking seems to be that this question taps into *aggregate* specific support, i.e. how satisfied respondents are with the Court's work across all issue areas and cases. If this is correct, we would expect to find opinions on the cases examined in this paper more closely linked to this particular measure than to the other measures that we treat as barometers of diffuse support. There is some evidence for this. In the combined results presented in Table 8, satisfaction with the way the Supreme Court has been working is, out of the six, the second most sensitive measure to opinion on the three cases. The differences are not large, however, and it is therefore an open question whether this aggregate specific support measure is conceptually and empirically distinct from the diffuse support measures. Factor analysis suggests that, outside of Quebec, this item can be seen as indicative of either specific or diffuse support. Within Quebec, it is evidently more an indicator of diffuse support.

60 To check whether the differences in Panel C of Table 8 are simply reflections of differences between Quebecers and other Canadians, OLS regression was used to isolate the effect of opinion on the secession reference independent of a Quebec-ROC variable. When this was done, all the statistically significant differences reported in Panel C remained significant at the same levels.

61 Paul M. Sniderman, Joseph F. Fletcher, Peter H. Russell and Philip E. Tetlock, "Political Culture and Double Standards: Mass and Elite Attitudes toward Language Rights in the Charter of Rights and Freedoms," *Canadian Journal of Political Science*, Vol. 22, no. 2 (June 1989), pp. 259-84.

62 See the statistics on Supreme Court Charter review cases in Peter H. Russell, "The Supreme Court and the Charter: Quantitative Trends — Continuities and Discontinuities," *Canada Watch*, Vol. 6, nos. 4, 5 and 6 (October 1998), pp. 61-64 and Patrick Monahan "The Supreme Court of Canada's 1997 Constitutional Decisions: A Statistical Overview," in the same volume, pp. 102-07.

63 For the analysis in this section, we have treated all those who disagreed with one of the elements in the secession reference as opponents of the ruling. Only those agreeing with both are coded as supporters.

64 See F.L. Morton, "Dialogue or Monologue?", *Policy Options*, Vol. 20, no. 3 (April 1999), pp. 23-26.

65 See, for example, Woodard, "Ralph Gets Moral, and Alberta Gets Gay Rights," pp. 12-17.

66 Mondak and Smithey conclude that "Critics may assail the Supreme Court for its controversial edicts . . . [but] the Court would enter precarious turf only if it were to rule against the tide of public opinion at an extremely frequent rate." "The Dynamics of Public Support for the Supreme Court," p. 1131.

Résumé

Canadian Attitudes toward the Charter and the Courts in Comparative Perspective

Joseph F. Fletcher et Paul Howe

Jusqu'à maintenant, on s'est trop peu préoccupé d'une question qui est pourtant au cœur de l'actuel débat sur l'activisme judiciaire : l'opinion des Canadiens et des Canadiennes sur la Charte des droits et libertés et sur les nouvelles responsabilités imparties aux tribunaux depuis 1982. Les citoyens sont-ils satisfaits ou mécontents de la situation ? Préféreraient-ils que le pouvoir judiciaire fasse montre d'un plus grand respect à l'égard des décisions du pouvoir législatif ?

Pour répondre à ces questions, l'Institut de recherche en politiques publiques (IRPP) a commandé un sondage, qui a été effectué en mars 1999 auprès de 1005 répondants à travers le Canada. L'analyse des résultats permet une première constatation : la plupart des Canadiens connaissent la Charte des droits et approuvent l'usage qui en est fait. Plus de 85 p. 100 des répondants ont déjà entendu parler de la Charte et, de ce nombre, 82 p. 100 considèrent qu'elle constitue « une bonne chose pour le Canada ». Les niveaux de conscience et d'appui sont à peu près les mêmes qu'en 1987, année où les mêmes questions furent posées à 2000 Canadiens et Canadiennes dans le cadre d'une semblable enquête.

Les tribunaux bénéficient eux aussi d'un solide appui. Interrogés sur la question de savoir qui, des législatures ou des tribunaux, doit avoir le dernier mot lorsqu'une loi est jugée inconstitutionnelle, les répondants optent pour les tribunaux dans une proportion de deux sur trois. Là aussi, les chiffres demeurent pratiquement inchangés depuis 1987.

Les données recueillies en réponse aux questions qui portaient sur la Cour suprême du Canada permettent également des comparaisons entre pays. Sur certains points, les Canadiens affichent un haut degré d'approbation à l'égard du pouvoir judiciaire. Ainsi, 77 p. 100 d'entre eux se disent très satisfaits ou assez satisfaits de la façon dont la Cour suprême s'acquitte de son rôle ; c'est là une proportion plus grande que dans la plupart des autres pays, y compris les États-Unis. Sur d'autres questions, cependant, les Canadiens donnent à leur plus haut tribunal un appui moins massif que ne le font les citoyens d'autres pays.

Comment expliquer ces messages contradictoires ? Il apparaît que l'appui plus mitigé des Canadiens à certains arrêts de la Cour suprême reflète une opposition au fédéralisme plutôt qu'à l'autorité judiciaire. Comme ce facteur n'est pas susceptible d'intervenir dans les pays à structure unitaire, il convient d'user de circonspection dans les comparaisons internationales.

Notre étude cherchait, enfin, à sonder l'opinion des Canadiens sur le mode de nomination des juges de la Cour suprême. Or, seulement 8 p. 100 des répondants estiment que la nomination des juges devrait relever du premier ministre du Canada. Près de la moitié préféreraient que ce choix soit fait par les provinces, tandis que plus du tiers aimeraient que le parlement fédéral y participe. On note toutefois des divergences entre l'opinion des répondants qui sont au courant de la méthode actuelle de nomination et l'opinion de ceux qui ne le sont pas. Les premiers ont tendance à préférer le Parlement aux provinces, alors que les seconds favorisent plutôt la participation des provinces.

Supreme Court Cases and Court Support: The State of Canadian Public Opinion

Joseph F. Fletcher et Paul Howe

Mettant à profit les résultats du sondage mené par l'IRPP en mars 1999 sur la Charte des droits et l'action des tribunaux, les auteurs examinent les rapports qui lient l'accueil réservé à trois décisions rendues par la Cour suprême et l'appui public dont cette cour jouit en général.

Les arrêts concernés statuaient sur des questions cruciales : la liberté civile dans l'affaire *R. c. Feeney*, l'égalité dans l'affaire *Vriend c. l'Alberta*, et la légitimité politique dans le cas du *Renvoi sur la sécession du Québec*. Ces trois jugements ont été diversement accueillis par le public. Dans l'affaire *Vriend*, la majorité des répondants (78 p. 100) se disent d'accord avec l'arrêt qui a forcé le gouvernement albertain à étendre aux homosexuels l'application des droits de la personne. Inversement, une solide majorité est en désaccord avec l'arrêt *Feeney* où la Cour, dans un procès pour meurtre, a rejeté un important élément de preuve parce que celui-ci avait été obtenu par des moyens abusifs. Quant à la décision du même tribunal sur le renvoi concernant la sécession du Québec, il est diversement reçu. Dans le reste du Canada, la majorité des répondants appuient l'interdiction de toute sécession unilatérale ainsi que l'obligation de négocier les termes d'une éventuelle séparation; au Québec, 41 p. 100 des répondants reconnaissent que la province ne peut pas déclarer unilatéralement son indépendance, et la majorité appuient l'obligation de négocier.

Chose significative, on observe la même diversité quant au lien entre l'accueil que le public réserve à chacun de ces jugements et l'appui qu'il accorde en général à la Cour suprême et à la Charte des droits. On constate en particulier que, dans les cas où la majorité des Canadiens s'opposent à la décision de la Cour suprême (comme dans l'affaire *Feeney*), cette attitude influence fort peu leur opinion globale à l'égard des institutions judiciaires. Par contre, dans les cas où le sentiment populaire coïncide avec le jugement de la Cour (comme dans l'arrêt *Vriend* et, à un moindre degré, dans le *Renvoi sur la sécession du Québec*), l'accueil que l'on réserve à la décision de la Cour est plus étroitement lié à l'opinion globale que l'on entretient sur celle-ci.

L'article s'intéresse également aux diverses combinaisons d'opinions. Assez rares sont les répondants qui acceptent ou rejettent l'ensemble des trois jugements : un peu plus de 10 p. 100 dans un cas comme dans l'autre. La plupart nuancent leurs opinions. Comme on pouvait s'y attendre, l'appui global accordé aux tribunaux varie considérablement selon que l'on souscrit aux jugements en question ou que l'on s'y oppose. Cela dit, même les opposants les plus constants donnent un appui modéré aux tribunaux.

De cette analyse, les auteurs concluent que la désapprobation suscitée par certains arrêts est moins répandue qu'on pourrait le penser et que cette désapprobation a relativement peu d'influence sur l'attitude générale envers les tribunaux. Les institutions judiciaires conservent la confiance du public.

Summary

Canadian Attitudes toward the Charter and the Courts in Comparative Perspective

Joseph F. Fletcher and Paul Howe

A question at the heart of the current debate about judicial activism has not been adequately addressed to date: What do Canadians think about the Charter of Rights and the new responsibilities of the courts since 1982? Are they satisfied or dissatisfied? Would they like to see greater judicial deference to legislative decisions?

To help answer these questions, the Institute for Research on Public Policy commissioned a national survey of 1,005 Canadians, conducted in March 1999. The survey findings indicate, firstly, that most Canadians know about the Charter of Rights and like what they see. Over 85 percent of respondents have heard of the Charter, and among these people, 82 percent consider the Charter "a good thing for Canada." Levels of awareness and support are roughly the same as in 1987, when the same questions were put to 2,000 Canadians in a similar survey.

The courts also receive a strong show of support. Asked whether the legislatures or the courts should have the final say when a law is ruled unconstitutional, respondents pick the courts by a 2 to 1 margin. Again these figures are essentially unchanged since 1987.

The survey data also allow for some cross-national comparisons on questions that ask about the Supreme Court of Canada. On certain items, Canadians stand out as strong supporters of their highest court. For example, 77 percent say they are very or somewhat satisfied with the way the Supreme Court has been working, a higher figure than in most other countries, including the United States. But on other questions Canadians are less supportive of their highest court than people elsewhere.

The source of these mixed signals? It turns out that the lower Canadian support for the Supreme Court on certain measures seems to reflect anti-federalist sentiment rather than opposition to judicial authority. Since this confounding effect is likely not present in many other countries, these cross-national comparisons should be treated with caution.

The survey also sought Canadians' opinions on Supreme Court appointment procedures. Only eight percent think that the Prime Minister should choose Supreme Court judges. Nearly half would prefer that the provinces make the choice, while more than a third would like Parliament to be involved in the decision. However, there are differences of opinion between those aware of the current method of appointment and those unaware. The former tend to prefer Parliament over the provinces, whereas the latter tend to favour provincial input.

Supreme Court Cases and Court Support: The State of Canadian Public Opinion

Joseph F. Fletcher and Paul Howe

Using data from IRPP's March 1999 national survey on the Charter and the courts, this paper looks at how public opinion on three controversial Supreme Court of Canada rulings relates to overall support for the Court. The rulings — touching upon core issues of civil liberty (*R v. Feeney*), equality (*Vriend v. Alberta*) and political legitimacy (*Reference re Secession of Quebec*) — elicit varying levels of support. Most (78 percent of respondents) agree with the gist of the *Vriend* decision, which forced the Alberta government to extend human rights protections to homosexuals. A solid majority opposes *Feeney*, where the Court threw out important evidence in a murder case on the grounds it had been improperly obtained. Opinion on the Quebec secession reference is mixed: outside Quebec, a majority supports both the injunction against unilateral secession and the obligation to negotiate proviso; in Quebec, 41 percent agree the province cannot secede unilaterally, while a majority backs the obligation to negotiate.

Significantly, the connection between public attitudes on these rulings and general support for the Court and the Charter varies as well. Notably, where Canadians are generally opposed to the ruling, as in *Feeney*, these attitudes have little leverage on overall assessments of judicial institutions. In contrast, where public sentiment is consonant with the Court's decision — *Vriend*, and to a lesser degree, the secession reference — opinion on the case is more tightly linked to general attitudes.

Combined attitudes on the cases are also considered. Relatively few oppose all three, relatively few support all three (a little over 10 percent in each case), while most are of mixed opinion. As expected, there are considerable differences in general support for the courts between consistent opponents and consistent supporters of Court rulings. That said, even consistent opponents remain moderately supportive of the courts.

Our general conclusion based on three high profile cases: continued goodwill towards Canada's judicial institutions is understandable, since public disapproval of particular rulings is less widespread than might be imagined and that which does exist has a fairly muted impact on more general attitudes.